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Supreme Court of the United States

OCTOBER TERM, 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,
PETITIONER,

vs.

CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED DECEMBER 6, 1948.

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9763.

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

JOINT APPENDIX.

Petition of Transcontinental & Western Air, Inc., for Review of Order of the Civil Aeronautics Board

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia:

Petitioner, Transcontinental & Western Air, Inc., respectfully shows:

1. Petitioner is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in the State of Missouri. Petitioner is an air carrier engaged in the transportation of persons, property and mail by air-

craft in the United States and elsewhere pursuant to certificates of public convenience and necessity issued to it under the Civil Aeronautics Act of 1938 (hereinafter sometimes referred to as the "Act").

2. This petition is filed under, and the jurisdiction of this Court is based on, Section 1006 of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U. S. C. Sec. 646, providing for review by this Court of orders of the Civil Aeronautics Board (hereinafter sometimes referred to as the "Board"). Petitioner seeks review of an order, Serial Number E-1033, in Docket No. 2849, issued and entered by the Board on December 2, 1947, in a proceeding described in paragraph 3 hereof, and served on petitioner on December 5, 1947.

3. The nature of the proceedings before the Civil Aeronautics Board which resulted in the order sought to be reviewed was as follows:

(a) By petition filed March 14, 1947, pursuant to Section 406 of the Act, petitioner applied to the Board for an order fixing and determining fair and reasonable rates of compensation, effective January 1, 1946, for transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over certain routes operated by it wholly within the United States and designated as Routes No. 2, 38, 44 and 58. Petitioner stated therein, among other things, that costs of providing air transport services had during the preceding year continued to rise at an unprecedented rate while load factors, including mail loads, had declined materially; that it had suffered substantial loss through extraordinary events, including the grounding by Government order of aircraft known as Constellations and the suspension of all operations as a result of a pilots' strike, which had affected it alone among all United States domestic airlines; and that the record of the preceding year and all reasonable forecasts of the results of future operations established the need for an immediate adjustment of air mail compensation to provide

the relief contemplated by the Act. Petitioner alleged therein, among other things, that the rate of compensation then applicable was not, and from and after January 1, 1946 had not been, a fair and reasonable rate of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith on said routes within the meaning of Section 406 of the Act. The proceeding upon that petition is the Board's Docket No. 2849.

(b) By motion dated May 27, 1947, Public Counsel of the Board moved the Board to enter an order denying said petition, without a hearing on the facts, in so far as it requested an increase in mail rate from January 1, 1946 to March 14, 1947, on the ground, among others, that such adjustment should not be made as a matter of sound general policy. Petitioner filed an answer, dated June 11, 1947, to said motion of Public Counsel. Thereafter, by amendment dated June 23, 1947, Public Counsel amended their motion to dismiss by adding as a ground therefor that the Board had no authority to grant said petition in so far as it related to a period prior to the filing thereof.

(c) Oral argument was held before the Board on July 16, 1947.

(d) On December 2, 1947, the Board (Member Lee dissenting) caused to be entered the order sought to be reviewed herein, dismissing the petition in so far as it requested the fixing of a mail rate for a period prior to March 14, 1947.

4. On January 20, 1948, within the time provided by the regulations of the Board as extended by stipulation, petitioner filed with the Board a petition for reconsideration and reargument of its said order. Said petition has not yet been acted upon. This petition for review by this Court is filed within sixty days after the entry of the order sought to be reviewed, in accordance with Section 1006 of the Civil Aeronautics Act of 1938 and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. Sec. 1009.

5. The order sought to be reviewed is a final adjudication and determination of petitioner's application to the Board to fix fair and reasonable rates for the period from January 1, 1946 to March 14, 1947 and of its right to additional compensation therefor. Petitioner has a substantial interest in said order, within the meaning of Section 1006 of the Civil Aeronautics Act of 1938, as is shown by the facts set forth herein and particularly since it is deprived thereby of the difference between the air mail compensation paid it for the period from January 1, 1946 to March 14, 1947 and the fair and reasonable compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith as furnished by petitioner during said period. Petitioner has suffered irreparable injury and will continue to suffer irreparable injury unless the order sought to be reviewed is set aside.

6. Petitioner prays for review of said order by this Court and that, upon said review, this Court set aside said order and direct further proceedings in accordance with the Civil Aeronautics Act of 1938.

7. By the order sought to be reviewed a majority of the then members of the Board erroneously held that the Board has no power to fix fair and reasonable rates of compensation for any period prior to the date of the filing of a petition therefor. Said order is, to the prejudice of petitioner, arbitrary, capricious and contrary to law. Without limiting the generality of the foregoing, petitioner assigns the following errors:

(a) The Board's conclusion as a matter of law that it does not have authority to fix a retroactive rate in this case (p. 8 of its opinion, made a part of said order) is contrary to the Civil Aeronautics Act of 1938, and particularly to Section 406(a) thereof empowering and directing it upon the petition of an air carrier to "fix and determine from time to time" reasonable rates of compensation and "to make such rates effective from such dates as it shall determine to be proper."

(b) The Board's decision, before a hearing and not based on any evidence on which it could determine whether the rate in effect from January 1, 1946 to March 14, 1947 was fair and reasonable, is contrary to Section 406(a) of the Act, fails to take into consideration rate-making elements as required by Section 406(b) of the Act and the declaration of policy and statement of public interest contained in Section 2 of the Act, and is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

(c) The Board's power to fix rates "from such date as it shall determine to be proper" being clear under the Act, its inquiry whether Section 406(a) "was not intended to have a somewhat narrower meaning" (p. 9) is improper, unwarranted and contrary to law.

(d) The Board's conclusion that "the Act was never intended to vest in the Board the retroactive rate-making power" (pp. 9-10) is erroneous and without support in law or fact.

(e) The Board's application to the Act of provisions of, and decisions under, public utility regulatory and other statutes (pp. 10-14), in disregard of the particular provisions of the Act, is improper, unwarranted and contrary to law; and the provisions of, and decisions under, such public utility regulatory and other statutes do not support the Board's conclusion concerning the intent or meaning of the Act or its power thereunder.

(f) The Board erred in considering as evidence of legislative intent ambiguous statements made by a private individual before Congressional Committees (pp. 17-19), and such statements do not support the Board's conclusion that "no retroactive rate-making authority was in fact intended" by the statutory provision authorizing it to make rates effective "from such date as it shall determine to be proper" (p. 19).

(g) The Board erred in holding that it has no power under the Act to exercise discretion, after hearing the facts

of each case, and in disregarding its previous exercise and recognition of this power.

(h) The Board's refusal to award petitioner the fair and reasonable compensation for the period from January 1, 1946 to March 14, 1947 is a deprivation of property without due process of law and a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

8. No previous application for the relief sought herein has been made to any other court or judge.

WHEREFORE, petitioner respectfully prays that this Court review the said order of the Board, issued on December 2, 1947; that a copy of this petition be forthwith transmitted to the Board and that a transcript of the record upon which said order was entered be thereupon certified and filed by the Board in this Court, in accordance with the Act; that upon such review by this Court, the said order be set aside and further proceedings by the Board ordered; and that petitioner have such other, further and different relief as to this Court may seem just and proper.

Dated: January 30, 1948.

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner

By GERALD B. BROPHY,
JAMES K. CRIMMINS,
Attorneys for Petitioner,

Office & P. O. Address:
25 Broadway,
New York 4, N. Y.

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
25 Broadway,
New York 4, N. Y.
of Counsel.

STATE OF NEW YORK,
County of New York, ss:

JAMES K. CRIMMINS, being duly sworn, deposes and says that he is one of the attorneys for petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true, and that the reason why this verification is not made by the petitioner is that the said petitioner is a foreign corporation.

JAMES K. CRIMMINS.

Sworn to and subscribed before me
this 30th day of January, 1948.

DOROTHEA A. O'BRIEN

Dorothea A. O'Brien
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 111, Reg. No. 101-0-9
N. Y. Co. Clk's No. 41, Reg. No. 173-0-9
Commission expires March 30, 1949

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Civil Aeronautics Board

Docket No. 2849

In the Matter of the Petition of
TRANSCONTINENTAL & WESTERN AIR, INC.

for an order fixing and determining fair and reasonable rates of compensation for transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over Routes No. 2, 38, 44 and 58, pursuant to Section 406 of the Civil Aeronautics Act of 1938

Petition for an Order Fixing Rates of Compensation for the Transportation of Mail by Aircraft on Routes No. 2, 38, 44 and 58

TO THE HONORABLE, THE CIVIL AERONAUTICS BOARD:

TRANSCONTINENTAL & WESTERN AIR, INC. (hereinafter called "TWA") respectfully states:

1. During the past year, costs of providing air transport services have continued to rise at an unprecedented rate. At the same time, load factors have declined materially. This has been particularly true of mail loads, which have fallen off even more drastically than other traffic since the cessation of hostilities.

These factors of rising costs and declining loads have affected TWA and every other air carrier. In addition, TWA has suffered substantial loss through three events of catastrophic proportions, which affected TWA alone among all United States domestic airlines.

The new four-engine Constellation aircraft, deliveries of which to TWA began in September 1945, remained on the ground for months as the result of controversies with the Air Line Pilots Association as to rates of pay, rules and working conditions applicable to such aircraft.

3. Scheduled service with this equipment therefore

could not be inaugurated, even on a limited scale, until February, 1946, and could be increased only very gradually thereafter. Notwithstanding this event and the resulting losses, TWA reported a net profit from operations for the month of June 1946, and anticipated profitable operations during the following months.

However, on July 11, 1946, all Constellation aircraft were grounded by order of the Administrator of Civil Aeronautics. As a consequence, all the Constellations owned by TWA were out of revenue service until the middle of September, and many considerably longer, while required modifications were being made. Virtually all of TWA's costs continued throughout this period. The anticipated profitable summer operations were thus converted into serious losses. TWA was at that time the only domestic air carrier operating Constellation aircraft within the United States.

TWA was only beginning to recover from the grounding and its consequences when operations throughout its entire system were completely shut down on October 21, 1946 by a strike of the airline pilots. This strike followed a 30-hour ultimatum for wage demands substantially in excess of the rates recommended by the Fact Finding Board appointed by President Truman which TWA had placed into effect. The union demands, if granted, would have meant still more drastic increases in the cost of air transportation to TWA and to the entire air transport industry. The shutdown continued for almost four weeks, and resulted in further severe losses to TWA. These losses are continuing and will continue for some time in the future as efforts are made to rebuild traffic volume and restore service to the required levels.

The record of the past year, and all reasonable forecasts of the results of future operations, establish the need for an immediate adjustment of air mail compensation to provide the relief contemplated by the Civil Aeronautics Act.

B. Accordingly TWA submits this petition under Section 406 of the Civil Aeronautics Act for the determination of fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over Routes No. 2, 38, 44 and 58,* and in compliance with the Board's regulations alleges the following:

1. TWA is a corporation duly organized and existing under the laws of the State of Delaware with its principal office located at No. 101 West 11th Street, Kansas City 6, Missouri.

2. TWA holds certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing it to engage in scheduled air transportation with respect to persons, property and mail on Routes No. 2, 38, 44 and 58. TWA also holds a certificate of public convenience and necessity for foreign air transportation approved by the President July 5, 1945, as amended.

3. The rate of compensation currently applicable to the transportation of mail by aircraft on Routes No. 2, 38, 44 and 58 is 45 cents per ton-mile, or fraction thereof, of mail carried. This rate became effective on January 1, 1945, as the result of final order of the Board in Docket No. 1700, dated October 26, 1945 (Order Serial No. 4151).

4. Said rate of compensation to TWA is not, and from and after January 1, 1946 has not been a fair and reasonable rate of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith on Routes No. 2, 38, 44 and 58, within the meaning of Section 406 of the Civil Aeronautics Act of 1938.

5. Pursuant to subdivision (c) of Section 406 of the Civil Aeronautics Act of 1938, TWA states that it believes that from and after January 1, 1946, the fair and reasonable rate of compensation to it for the transportation of mail

* Wherever Route No. 2 is referred to in this Petition it shall be deemed to include Routes No. 2, 36, 37, 61 and 67, which were consolidated into the single Route No. 2 by the Board's order of September 23, 1946, No. 5200.

by aircraft, the facilities used and useful therefor, and the services connected therewith, over Routes No. 2, 38, 44 and 58, is at least the following: a base rate of thirty cents (30¢) per airplane mile to be paid for a base poundage of 300 pounds of mail or less, plus an excess poundage rate of 0.03 cents per airplane mile for each pound, or fraction thereof, of mail in excess of the base poundage, computed monthly on direct airport-to-airport mileage; said rate to be appropriately reduced in respect of future periods, as conditions may warrant.

WHEREFORE, the Petitioner prays that in view of the urgency of the situation, the Board expedite this petition by utilizing its show cause procedure based on information available to the Board; and that the Board issue an order granting the relief herein requested, or such other and further relief as it may determine to be proper.

The Petitioner has served a copy of this petition on the Postmaster General by sending the same to him by registered mail post-paid prior to the filing of the petition with the Board.

Respectfully submitted,

TRANSCONTINENTAL & WESTERN AIR, INC.
By JOHN A. COLLINGS
Vice President

FRANK E. BUSCH
Director of Operations

LEO R. GILLERAN
Controller

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
Attorneys for Petitioner,
Office and Post Office Address,
25 Broadway,
New York 4, N. Y.

6 STATE OF MISSOURI, COUNTY OF JACKSON, ss.:

JOHN A. COLLINGS, being duly sworn, deposes and says that he is Vice President and, in the absence of the President and Executive Vice President, the Chief Executive of TRANSCONTINENTAL & WESTERN AIR, INC., the Petitioner in the above entitled Petition; that he has read and is familiar with the contents of the Petition; that he intends and desires that in granting or denying the relief applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that to the best of his information and belief, every statement contained in the Petition is true and no such statement is misleading.

JOHN A. COLLINGS.

Subscribed and sworn to before me by the affiant above named, this 12th day of March, 1947.

E. WILEY BARKER
Notary Public

My Commission Expires Oct. 20, 1948
(Seal)

7 STATE OF MISSOURI, COUNTY OF JACKSON, ss.:

FRANK E. BUSCH, being duly sworn, deposes and says that he is Director of Operations of TRANSCONTINENTAL & WESTERN AIR, INC., the Petitioner in the above-entitled Petition; that he has read and is familiar with the contents of the Petition; that he intends and desires that in granting or denying the relief applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that to the best of his information and belief, every statement contained in the Petition is true and no such statement is misleading.

FRANK E. BUSCH.

Subscribed and sworn to before me by the affiant above named, this 12th day of March, 1947.

E. WILEY BARKER
Notary Public

My Commission Expires Oct. 20, 1948
(Seal)

8 STATE OF MISSOURI, COUNTY OF JACKSON, ss.:

LEO R. GILLERAN, being duly sworn, deposes and says that he is the Controller and, in the absence of the Treasurer, chief financial officer of TRANSCONTINENTAL & WESTERN AIR, INC., the Petitioner in the above-entitled Petition; that he has read and is familiar with the contents of the Petition; that he intends and desires that in granting or denying the relief applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that to the best of his information and belief, every statement contained in the petition is true and no such statement is misleading.

LEO R. GILLERAN.

Subscribed and sworn to before me by the affiant above named, this 12th day of March, 1947.

E. WILEY BARKER
Notary Public

My Commission Expires Oct. 20, 1948
(Seal)

9 May 27 11:38 A. M. '47

Motion of Public Counsel to Dismiss Petition for Retroactive Rate

Public Counsel move the Board to enter an order denying the petition filed herein on March 14, 1947 by Transcontinental and Western Air, Inc. (hereinafter called

TWA) insofar as such petition requests an increase in TWA's domestic mail rate, prior to the date of the filing of the petition by TWA (from January 1, 1946 to March 14, 1947) in the amount of $11,157,358, and in support of their motion allege and represent the following:

1. That the Board, by opinion[1] and order (Order Serial No. 4151) issued October 26, 1945, fixed and determined for TWA a mail rate effective on and after January 1, 1945 of 45 cents per ton mile over its entire domestic system including all of the routes covered by the petition filed by TWA on March 14, 1947, which rate is still in effect.

2. That TWA, on March 14, 1947, filed a petition requesting the establishment of a mail rate of 30 cents per airplane mile to be effective on and after January 1, 1946 over Routes Nos. 2,[2] 38, 44 and 58, and that this petition requested the retroactive adjustment of mail rates prior to the date of filing the petition for the period January 1, 1946 to March 14, 1947, which if granted, would result in TWA's receiving an amount of $11,157,358 in retroactive mail pay, in addition to the $3,541,000[3] which TWA has already received for this period. This would result in total mail pay of $14,698,358, or 415 per cent of that previously fixed by the Board.

3. That there has been no mail rate proceeding affecting these routes since the Board fixed TWA's present mail rate on October 26, 1945 until the present petition on March 14, 1947, yet petitioner is asking for a rate retroactive to January 1, 1946, barely two months after the Board rendered its decision.

4. That the Board should not increase TWA's mail pay prior to the filing date of its petition for the following reasons:

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[1] Transcontinental & Western Air, Inc., Mail Rates, 6 CAB 595 (1945).

[2] Route No. 2 in this proceeding includes Routes Nos. 36, 37, 61 and 67 which were consolidated into said Route No. 2 by Board Order No. 5200 issued September 23, 1946.

[3] Actual mail pay received by TWA for the 14 days in March is estimated.

(a) *The Board has consistently held as a matter of sound general policy that no adjustments should be made in mail rates during periods when rate proceedings are not pending.*

The Board has enunciated its position as follows:

"* * * Aside from the question of whether it has the statutory power to review a rate prior to the date of the institution of the proceeding, it seems desirable as a matter of policy that the rate for any given period become finally fixed at some point in time and that such point be that at which the rate is first challenged or questioned by the institution of a rate proceeding either by the carrier or by the Board. Such a policy appears to be fair since it permits every rate order to be final for any period during which it is not questioned by a proceeding looking toward its revision."[4]

". . . a rate once fixed should remain final at least until such time as the rate is first publicly challenged or questioned by the institution of a rate proceeding, either upon petition of the carrier or on the Board's initiative."

* * * * * * * * * * *

"All factors considered, we are of the opinion that as a matter of sound general policy there should be no adjustments in mail rates during periods when a rate case is not pending. We believe that the interest in certainty and finality of administrative proceedings will be served by a policy which will provide for an adjustment of rates only when an issue has been raised with respect thereto by the institution of a proceeding, thereby putting all interested persons on notice that the rate may be adjusted and that conduct should be determined in such light."[5]

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[4] Continental Air Lines, Inc., Mail Rates, 3 CAB 395, 401 (1942).

[5] Braniff Airways, Inc., Mail Rates, 3 CAB 633, 635-637 (1942). *Accord:* Continental Airlines, Inc., Mail Rates, 2 CAB 683, 688 (1941); Mid-Continent Airlines, Inc., Mail Rates, 3 CAB 464, 466 (1942); Transcontinental & Western Air, Inc., Mail Rates, 4 CAB 139, 143 (1943); All American Aviation, Mail Rates, 4 CAB 354, 357 (1943); Pan American Airways, Inc., Alaska Mail Rates, 6 CAB 61, 69 (1944).

The above policy of the Board permits every rate order to be final during a period in which it is not in question by a proceeding relative to its revision. The principle of finality has long been recognized not only by the Board, but by courts and other administrative agencies as being supported by the strongest considerations of public interest and essential to the proper fixing of rates. It encourages efficiency and economy not only by requiring a carrier to live within a rate until time has established the necessity of challenging the rate, but also, by assuring the carrier that any profits earned during a period when no proceeding is pending, may be retained. The TWA petition if granted would, by destroying the finality principle, discourage efficiency and economy. The incentive to live within a rate finally fixed by the Board would be destroyed.

Moreover, if the Board grants increases in mail pay for extraordinary losses incurred in a period prior to the filing of the petition it could not, consistent with its obligations to the public treasury, refuse to recapture extraordinary profits earned in such retroactive periods. Thus, managerial incentives to accomplish increased economies in operation would be substantially reduced, and by writing a question mark across any carrier's financial statements the carrier's ability to attract capital would be seriously impaired.

(b) *The Board has never adjusted a final mail rate effective prior to the date of the petition because of unusual circumstances.*

In a number of cases carriers have requested that adjustments in mail pay be made effective prior to the date of filing of petition on the ground of unusual circumstances,

but in every case the Board has denied such request.[6] In *Transcontinental and Western Air, Inc.*, Mail Rates, 4 CAB 139 (1943), the present petitioner itself filed a petition on March 13, 1941 seeking a retroactive adjustment of its mail rate for Route No. 2, effective as of October 1, 1940 on the ground that its rate had been based on the cost and revenue figures of Douglas equipment, and did not take into account the effect of TWA's new Boeing 307 equipment on its costs and revenues. TWA contended that its rate should be adjusted prior to the petition to October 1, 1940 because since that date it had gained sufficient experience in operating the Boeings so that the effect of the Boeing operations on TWA's mail rate should be considered. Petitioner also contended that its rate over Route No. 2 was inadequate. This case was consolidated with another rate proceeding involving Routes No. 36, 37, 38 and 44. The Board rejected TWA's contentions and refused to deviate from its "... policy of not reviewing rates prior to the institution of a proceeding by petition or by order..."

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The Western case[7] represents no departure from this policy. In that case the carrier petitioned on December 3, 1941 for a system rate to be effective from the date of the petition for Routes 13 and 19, and to be effective from June 12, 1941, for Route 52. The rates on Routes 13 and 19 had been in effect since October 28, 1938, while mail service on Route 52 had first commenced on June 12, 1941, and no

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[6] (a) In All American Aviation, Inc., Mail Rates, *supra*, All American petitioned for a retroactive increase of its mail rate on the ground that it was merely an adjunct of the post office and that the Board in fixing its present rate had erred with respect to All American's anticipated revenues and costs. All American contended that it could never regain its losses unless the Board looked past the date of the petition and adjusted its rate. The Board would not deviate from its policy of not retroactively adjusting a mail rate. *Accord:* Braniff Airways, Inc., Mail Rates, *supra*.

(b) In Pan American Airways, Inc., Alaska Mail Rates, *supra*, Pan American petitioned for a retroactive increase of its mail rate on the ground that it had delayed in filing its petition because of doubts as to the legal status of certain of its routes. Again, the Board adhered to its policy of not retroactively adjusting a mail rate.

[7] Western Airlines, Inc., Mail Rates, 4 CAB 451 (1943).

mail rate had ever been fixed for that route. Obviously, since no mail rate had been fixed for the carriage of mail on Route 52, the Board was obligated to consider the need of the carrier for compensation because of the carriage of mail over this route. As the Board stated, p. 444:

"Although respondent transported mail on Route
14 No. 52 at all times subsequent to June 12, 1941, no rate proceeding was pending during the period from June 12, 1941, to December 3, 1941, at which time the carrier filed its petition. Under the circumstances a review of respondent's need for mail compensation subsequent to June 12, 1941, is in order. The Board has reviewed respondent's need for mail compensation during the entire period from June 12, 1941, to December 31, 1942, and having found the mail compensation already paid respondent was adequate to meet all of its need has not undertaken to attribute that compensation to particular routes by prescribing the rates to be applicable to the several routes of the carrier throughout the period under review, since the total compensation of the respondent would not be affected. This, it should be emphasized, arises out of the unusual circumstances surrounding this case, where even though no proceeding was pending, a review of respondent's mail compensation was necessitated by the operation of a route for which no rate of mail compensation had been fixed. In the absence of *like* unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order." (Italics supplied)

Upon a review of the entire system operations, including the new route, from June 12, 1941 on, which showed that the carrier had already received sufficient mail pay to yield an annual return of 16.92 per cent after federal taxes on its average investment, the Board found that no additional mail compensation should be paid.

The Western case does not stand for any principle that retroactive mail pay adjustment will be made in cases of

unusual circumstances, but only that such adjustment may be considered under "like" circumstances. The case is merely a recognition by the Board that consideration will be given to a carrier's possible need for additional mail pay because of the operation of a new route for which no mail pay has previously been fixed. The present proceeding raises no such question. The granting of TWA's petition would constitute a major change in Board policy which, if followed to its logical result, and in fairness to all carriers and the public treasury, would undoubtedly open the door to an indefinite number of retroactive rate cases involving either the underwriting of extraordinary losses or the recapture of extraordinary profits.

(c) The allegations in the TWA petition do not justify the fixing of a rate effective prior to the date of the petition.

TWA apparently takes the position that because of the materialization of certain business risks (labor disputes and the grounding of the Constellations) which resulted in losses, the Board should take into account these alleged "unusual circumstances" and adjust its present rate retroactively. As has been pointed out above the Board has never adopted any general policy of making retroactive mail pay adjustments because of "unusual circumstances." Every business including the air transport industry is subject to risks, the exact nature and extent of which cannot be anticipated or computed in fixing a prospective rate. The possibility of grounding of planes or of labor disputes are among normal risks to which all air carriers are subject. In fixing the mail rate of 45 cents per ton mile now in effect for TWA, the Board specifically recognized the possibility of abnormal risks involved in the transitional post-war period. Moreover, although TWA was a service rate carrier, the Board made additional provision therefor by amending the show cause order and increasing the tentative mail rate from 32 to 45

cents per ton mile, an increase of 40.6 per cent. The rate fixed therein was designed to provide TWA with an overall rate of return on total investment of 13.37 per cent after taxes and obviously constituted a rate of earnings which can only be justified on the obvious basis that it is intended to cover losses or reduced earnings which could not be anticipated, but which might occur.

While the Board because of the unpredictable nature of post-war operations did not allocate cost and investment to the mail service, the application of the Board's standard allocation formula to the basic figures employed in fixing the rate as set forth in Appendices Nos. 2 and 3 attached to the Opinion, indicates a rate on the investment in the mail service of 46.74 per cent after taxes.

The recovery of losses resulting from events not specifically foreseeable, but of a type which constitute usual business risks must be made out of earnings for periods both before and after the outcome of such events. TWA's rate of return, as are all rates fixed by the Board, was determined with this principle in mind. Its rate for the future will be based on this same principle. For this reason the rate making technique contemplates that losses incurred as a result of such risks shall be met out of rate of return. The rate of return allowed is materially higher, therefore than it would be if it were contemplated that reimbursement could be had retroactively for actual losses which have in effect materialized.

This principle was recognized in National Airlines, Inc., Mail Rates, CAB Docket No. 824 decided September 19, 1946, in which the carrier had suffered losses arising from a series of accidents, the direct effect of which was to curtail severely its volume of scheduled operations. In addition, its operations were curtailed by a restriction to visual contact flying as ordered by the Civil Aeronautics Administration. The Board held that:

"The costs attributable to the accidents and the losses sustained through the curtailment of service im-

posed because of the petitioner's failure to maintain CAA operating standards, *are not appropriate costs to be allowed under the Act, for rate-making purposes.*" (Italics supplied).

The Board refused to consider these losses as appropriate costs to be allowed under the Act for rate-making purposes even though such losses were incurred during the pendency of a rate proceeding. The alleged unusual losses in this proceeding are of the same type as those in the National case and the Board should not consider them either retroactively or prospectively as proper costs for rate-making purposes.

Conclusion.

The strongest considerations of rate making policy require the dismissal of that part of TWA's petition which requests $11,157,358 retroactive mail pay for the period prior to the filing of the petition. Wherefore, Public Counsel respectfully move the Board for the entry of an order dismissing the petition filed herein insofar as such petition requires the establishment of a mail rate retroactively effective to January 1, 1946.

William C. Burt
Jerome J. Dick
Public Counsel

Washington, D. C.
May 27, 1947

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the attached motion upon all parties appearing of record in this proceeding by mailing to each said party a copy of said motion in a properly addressed, franked envelope.

Jerome J. Dick
Public Counsel.

Washington, D. C.
May 27, 1947.

19 Received Docket Section Jun 13 11.45 AM '47
Civil Aeronautics Board

20 **Answer of Petitioner to Motion of Public Counsel**

To the Honorable, the Civil Aeronautics Board:

The petition for increased mail compensation filed by TWA on March 14, 1947 seeks to recoup part of the losses suffered by TWA since January 1, 1946 as the result of a series of disastrous events which affected TWA alone of all domestic airlines. The petition also asks for expedited action because of the urgency of the situation. After waiting two and a half months, Public Counsel have now filed a motion to dismiss the petition insofar as it requests a review of rates prior to the date the petition was filed, which was the period during which the disastrous events occurred. The motion, strangely enough, does not even discuss either the Board's obligation under the law to grant the relief requested by TWA or the fairness of the claim for relief that has been made by TWA. On the contrary, Public Counsel's motion rests wholly on what they conceive to be a matter of the Board's "general policy" based on dicta appearing in previous cases unrelated to the present proceeding.

It should be made plain at the outset that the only
21 issue properly raised by Public Counsel's motion is whether or not the Board will hear TWA's petition for a review of rates prior to the date the petition was filed. No issue has been raised as to what, if any, relief the Board would accord in the event such a hearing is held. As to the first point, it seems obvious that TWA is entitled as a matter of law to have a hearing on the facts without pre-judgment of any of the issues raised by the unsupported allegations of Public Counsel.

I. Established Principles of Administrative Law Require a Review of TWA's Rates as Requested in Its Petition.

The motion of Public Counsel is frivolous since the Board is "not at liberty to decline to exercise its jurisdiction." *Alton Railroad Co.* v. *United States* 287 U. S. 229 at 236 (1932). There is a long line of Supreme Court cases holding that an administrative agency must accept jurisdiction of applications falling within the statutory authority of the agency. If it refuses to do so the federal courts will compel the agency to assume jurisdiction.* Thus, without first holding a hearing on the facts, the Board may not deny relief which it has the power to grant. On this basis alone the motion must be denied forthwith.

In *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178 (1920) the railroad brought suit for a mandamus to compel the Commission to hear proof on the "present costs of condemnation and damages or of purchase in excess of original cost of present value" of the railroad's property under a valuation statute. The Commission alleged (1) that such items were purely speculative and (2) that the Supreme Court had decided in the *Minnesota Rate Cases* that the calculation of such items would involve unjustifiable assumptions. Nevertheless, the
22 Supreme Court held without dissent that the Commission must proceed with a hearing under the statute, even though the Commission might be correct in its interpretation of the *Minnesota Rate Cases*, saying further (p. 188):

"... since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the *Minnesota Rate* ruling could furnish ground for refusing to carry out the commands of

* *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178; *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474 at 484, 5 (1912). See also *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 Fed. 2d 271 at 281, 2 (1946).

Congress, the exigency of which consideration is none the less manifest though it be borne in mind that the *Minnesota Rate Cases* were decided after the passage of the act in question.

"Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

The Supreme Court directed the grant of a writ of mandamus. A similar conclusion, regarding the Civil Aeronautics Board itself, was reached in *W. R. Grace & Co. v. Civil Aeronautics Board*, 154 Fed. 2d 271 at 281, 2 (1946).

Public Counsel raise no question regarding the power of the Board to hear TWA's petition, and clearly no such question exists. Consequently, even if the Board should agree with everything that Public Counsel allege, the Board cannot refuse to hear TWA's petition in full and may not dismiss any part. This rule is so well established that it needs no further elaboration and answers completely the issues raised by Public Counsel's motion. However, the motion of Public Counsel displays such a substantial misconception of the provisions of the Civil Aeronautics Act, and of the position taken by the Board under that Act, that the statements of Public Counsel, even though irrelevant to the motion, should not be permitted to stand unchallenged.

To repeat, the arguments which follow are not necessary to a determination of Public Counsel's motion. Public Counsel's motion must be dismissed because it seeks
23 to deny TWA the hearing which is guaranteed by our laws. The purpose of including the material set

forth below is to correct the erroneous assumptions and impressions implicit in Public Counsel's motion itself.

II. THE PROVISIONS OF THE CIVIL AERONAUTICS ACT CONTEMPLATE A RETROACTIVE INCREASE IN TWA RATES TO JANUARY 1, 1946.

A. *The statute.*

Not only does the Board have an absolute legal obligation to review TWA's rates for 1946, but in addition the Civil Aeronautics Act contemplates that such a review shall result in a retroactive adjustment in an instance of this type.

Under section 406(a) of the Act the Board is not just "empowered" to fix fair and reasonable rates of compensation, but, in addition, it is specifically "directed" to do so. The language is not permissive, it is mandatory. Under section 406(b) of the Act Congress did not give the Board permission to consider or not, as it may choose, the need of the carrier, but specified that the Board "shall take into consideration" the need of the carrier. This too is mandatory.

Finally, section 406(a) of the Act implements these statutory mandates by directing the Board "to make such rates (i.e., 'fair and reasonable rates') effective from such date as it shall determine to be proper."

This last quoted language is for the purpose of carrying out the expressed intent of Congress. It cannot be interpreted, as Public Counsel seem to imply, as authorizing the Board to evade the obligation imposed by Congress to fix fair and reasonable rates of compensation. If an air carrier's mail rates are unfair and unreasonable today, the Board cannot disregard its obligation to fix fair and reasonable rates by determining that it is "proper" that the new scale shall not become effective until some date next year. In giving the Board the administrative discretion to make rates "effective from such date as it shall determine to be proper" Congress did not give the Board the power to disregard its mandate that the rate shall be fair and reasonable.

Similarly, if TWA's rates were unfair and unreasonable during 1946, the Board must so find. In such event the Board must, under the Act, fix fair and reasonable rates for 1946 and make them effective for that period. The Board cannot as Public Counsel apparently argue, refuse to examine the rates for 1946; or upon examination and on a finding that considering an extended period the rates are unfair and unreasonable during 1946, refuse to do anything about them. While Public Counsel do not mention the statute in their motion, the interpretation they necessarily put on the Act would make a farce of the language. Congress did not lay down a directive in one breath, and in the next, give the Board a free hand to defeat the directive. The statute does not say that fair and reasonable rates shall be paid only for the period that the Board arbitrarily selects and that for other periods the rates may be unfair and unreasonable. It says that the rates shall be fair and reasonable for all periods, and that the Board shall make new rates effective on such date as will insure that the amounts received by the carrier will be fair and reasonable. This discretion is vested in the Board to implement the mandate of Congress, not defeat it.

B. *The alleged "general policy" of the Board.*

Public Counsel quote from a decision of the Board in 1942 in which the Board stated, "All factors considered, we are of the opinion that as a matter of sound general policy there should be no adjustments in mail rates during periods when a rate case is not pending." *Braniff Airways, Inc., Mail Rates*, 3 C. A. B. 633, 637 (1942). Based on this and similar language used by the Board in other cases, Public Counsel contend that TWA has no right to a retroactive adjustment.*

* One basic difficulty in Public Counsel's position stems from their interpretation of the phrase "general policy". Public Counsel apparently believe that "general policy" means something that applies to every instance. However, this is not the usual meaning of the word "general" in this context, which properly means "pertaining to the majority; common to the greater number but not to all; true to a large number or proportion; widespread or prevalent as distinguished from universal; as a *general* practice; *general* rain fall." *Funk & Wagnalls New Standard Dictionary*, 1935.

Yet even according to Public Counsel, all the Board has ever decided on this question is that it will not *usually* adjust rates for periods prior to the date of the filing of a petition for increased mail compensation. An examination of the facts involved in the cases considered by the Board establishes exactly that point, and nothing more.

One of the excepted situations was that involved in the Western Air Lines Mail Rate case which Public Counsel cite with approval. That case seems very much in point because it involved, as this case does, the inauguration of service on a new route. In the Western case, the carrier commenced service over route 52 on June 12, 1941, before a mail rate had been fixed for the route; in the present situation TWA commenced scheduled service on February 5, 1946 over a new route, its international operation, before a mail rate was fixed for that route. In the Western case the Board *reviewed the rates for Western's entire system operations*, including the new route, from June 12, 1941 on, saying:

"In the absence of *like unusual circumstances* the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order." (Italics supplied)

This language seems clear enough. The Board indicated that it would review rates prior to the filing of a petition in any case where "like unusual circumstances" exist, or to rephrase the words: in any case where unusual circumstances "likewise" exist. However, for some unexplained reason, Public Counsel attempt to establish that when the Board said "like unusual circumstances" it meant the "*same* circumstance": namely, a case where a carrier has initiated service on a new route prior to the date a mail petition is filed. Thus on page 6 of their motion Public Counsel state: "The Western case does not stand for any principle that retroactive mail pay adjustment will be made in cases of unusual circumstances, but only that such adjustment may be considered under 'like' circumstances." The Board

will recognize that this misquotation by Public Counsel of the language of the Board deals high-handedly with the grammar of the phrase. Omitting the word "unusual" has the effect of changing "like" from an adverb modifying "unusual" to an adjective modifying "circumstances", and constitutes an unjustified distortion of the plain reading of the phrase. It is submitted that if the Board had meant to say "like circumstances", it would have done so, but the Board did not; it said under "like unusual circumstances". The TWA situation, "like" that involved in the Western case, is one of unusual circumstances, and retroactive adjustment should be authorized.

However, even if the Board in the Western Air Lines Mail Rate Case had used the words the "same circumstances", or had otherwise specifically said that it would review rates prior to the filing of a petition *only* in a case where a carrier has initiated service on a new route prior to such filing, the TWA petition meets that test also. As stated above, TWA commenced operations under its new international certificate on February 5, 1946. Consequently even under the theory of the Western dicta as most strictly interpreted by Public Counsel the Board would be required to review the rate for TWA's entire system, including its domestic division, as far back as February 5, 1946. To repeat, in the Western case, the Board reviewed its rates for the entire system beginning with the date service commenced on the one new route. In view of the fact that from this point of view the TWA situation presents exactly the same circumstances as in the Western case, cited by Public Counsel with approval, we are unable to make any sense out of Public Counsel's motion.

There are still other instances in which the Board without even a discussion of the point, has made rates of compensation retroactive to a date prior to the filing of a petition. In a recent case involving Northeast Airlines the Board set a new rate for route 27 beginning May 1, 1945, although a proceeding relative to the rate for route 27 was not initiated until June 20, 1945.

In the Northeast case the effective date fixed by the Board for the revised rate on route 27 (May 1, 1945) was the date Northeast inaugurated service on its new route 65. If the retroactive feature in the Northeast case turns on that point, then we remind the Board of the fact that any such theory applicable to the Northeast case requires the Board to adjust the rate for TWA's domestic routes at least as far back as February 5, 1946, the date TWA commenced scheduled service on its new international route.*

In attempting to prove the point they urge, Public Counsel have relied wholly on the seven cases in which the Board has refused to make increased mail compensation effective prior to the date of filing of the application, quoting at length from two of them. Unfortunately, however, they have failed to include in these quotations the portions of the Board's decisions explaining the reason for applying this rule in the ordinary case. Immediately preceding the two full paragraphs quoted by Public Counsel at the top of page 3 of their motion, the Board in its decision in the Braniff Mail Rate Case (3 C. A. B. 633 at 636) stated:

"The Board has previously recognized that the Act places upon it a duty to maintain air mail rates at such level of fairness and reasonableness as will provide *earnings, which, when averaged over a reasonably extended time, will permit the fulfillment of the statutory objectives*, especially those stated in sections 2 and 406(b). This does not mean, however, that the earnings contemplated by the statute shall be reasonable during every particular period of time in which they are in effect. The fluctuations of traffic and revenue which characterize the airline industry strongly suggest the contrary. The earnings may in a limited period represent more or less than a reasonable profit; neverthe-

* In *Transcontinental & Western Air, Inc. Mail Rates*, 4 C. A. B. 139, the Board reviewed TWA rates *for its entire system* beginning March 1, 1941, even though the carrier's petition filed on March 13, 1941 requested that a rate be fixed on only one of TWA's routes, and inquiry as to the other four routes was not opened by Board action until August 13, 1941.

less, *the rates may still be reasonable if the average earnings over a reasonably extended period reach a fair level.*

"In fixing a rate for the future, however, we must
28 necessarily consider the results under existing rates during the past, and whether there be a deficiency, a just profit, or an excess profit, we look at the results for guidance in redetermining the rate. But, even so, *we must necessarily look at a sufficiently long period to reach a judgment as to a reasonable rate for the future.*" (Italics supplied)

It is clear from this language that the Board recognized that in the usual situation, losses incurred prior to the date of filing a petition can be offset by the profits resulting from future rates. Ordinarily, the condition complained of is occasioned by a minor fall-off in the carrier's earnings as a result of ordinary operating conditions. Each of the seven cases relied on by Public Counsel is exactly this type. All but one of these involved the period immediately prior to Pearl Harbor, when a moderate recession was encountered, whereas the opinions of the Board in these cases denying retroactive adjustment, were rendered some months later when all of the air carriers were experiencing a definite improvement in earnings.*

Consequently all the Board has so far decided is that in the ordinary case the Board will not adjust the carrier's losses prior to the filing of the petition because in the ordinary case losses in such periods can be easily recouped out of profits in later periods or out of other operations. In such a situation, rates over an extended period, looked at as an average, can be fair and reasonable and the Board will thereby have met its obligations under the Civil Aeronautics Act and the Constitution.

The instant proceeding, however, does not represent a case of that type. During 1946 TWA was struck with a

* The seventh case involved mail compensation on Pan American's Alaskan operations for a period during which the Board specifically found large profits on other Pan American divisions, 6 C.A.B. 61 (1944).

series of disasters that seriously crippled the Company. They were not of the usual type and they were of such magnitude as to make it impossible for the carrier to recoup the losses out of future earnings. The Civil Aeronautics
29 Board has followed the policy of providing uniform rates for the larger carriers, and since competition for mail between these carriers exists at all major points, uniform rates are highly desirable. Thus there is no possibility that any future rate set for the transportation of mail by TWA would provide fair and reasonable compensation over any reasonable period which includes the year 1946.

Section 406(b) of the Act provides that in fixing fair and reasonable rates of compensation the Board shall consider conditions peculiar "to the particular air carrier or class of air carriers" involved. Obviously in the present instance the Board considered conditions peculiar to the classes of air carriers involved by providing the uniform rate of 45 cents a ton mile for all of the major carriers. Just as obviously, the Board did not consider conditions peculiar to this "particular air carrier" because it did not know at the time the rate was fixed that TWA, unlike every other domestic air carrier, was going to have its planes grounded and its operations closed down by a pilots' strike. There are two possible ways of handling a situation of this kind. One is by a recognition of obligations imposed by statute in the public interest and the other is to follow Public Counsel's mechanical rule regardless of the effect that it has on the air transportation system of the United States. In this case there is no choice.

III. Principles of Justice Require an Increase in TWA's Rates Since January 1, 1946.

Even if we should assume for the sake of argument that the Civil Aeronautics Act and applicable constitutional provisions give the Board complete discretion to adjust TWA rates for 1946 or to deny such an adjustment, as the Board might deem appropriate, a denial would be contrary

to good conscience. A holding that the mere act of filing a formal petition shall determine the right to a fair
30 and reasonable rate of compensation, is not only inequitable, but is also unsound as a matter of administrative procedure.

Under the rule as the Public Counsel would have it, the Board would prefer the carrier who runs whining to the Board with a mail rate petition at the first sign of possible injury. Such a carrier would be assured of his right of adjustment. But by the same token, any carrier that tried to work out its troubles and deferred filing a petition in the hope that Government relief would be obviated by self-help, would be severely penalized. A policy of absolutely refusing any retroactive adjustments under any circumstances whether unusual or not, places a premium on seeking Government assistance at the first opportunity. It would make it essential that every carrier file an application with the Board on the happening or prediction of every unfavorable event, and more probably, the maintenance of petitions on file at all times as a safety measure.

Furthermore, two carriers affected by exactly the same circumstance and to exactly the same extent would be treated differently under the policy espoused by Public Counsel if one had a petition on file at the time while the other did not; yet both are operating under the same statute which provides that both shall have "fair and reasonable compensation"!

The unfairness of any such discrimination is obvious. It is equally apparent that the position urged by Public Counsel would tend to make carriers less likely to struggle against adversity before seeking Government aid and therefore it is unsound administratively.

The facts underlying TWA's losses also support the position that equity demands a review of TWA's rates for 1946.
The grounding of the Constellations was occasioned
31 by events beyond the control of TWA, and seriously injured TWA alone of all domestic airlines. In a

recent statement to the House Interstate and Foreign Commerce Committee Mr. William A. M. Burden, Assistant Secretary of Commerce, stated:

". . . The grounding action took place after a fire which occurred in one of the three aircraft during a training flight —not one carrying passengers. A number of engine (induction system) fires had occurred in Constellations many months previously and although we had taken corrective action which we believed had eliminated the cause of fires, we took the dramatic action of grounding the airplane pending assurance that an engine fire was not involved in the Constellation training accident.

"Investigation revealed that the source of the trouble was not an engine fire but a short circuit that caused overheating of an electrical fitting. Incidentally in the final accident report the CAB criticized the CAA inspection service for not ascertaining the defects of this fitting earlier—a clear indication that the Board does not hesitate to criticize the CAA in its reports despite the fact that no independent safety Board exists."*

The publication in which the foregoing appeared went on to say:

"Burden said he felt it was only fair to say that the grounding action and resultant publicity has worked an undue hardship on the Constellation, without question one of the world's outstanding transports. Modifications made as a result of grounding undoubtedly have made the Constellation the most advanced airplane of its class in service with respect to safety, and the principles developed from these modifications are now required for all comparable four-engine aircraft, Burden stated."*

Certainly it would be unconscionable to suggest that TWA should be called upon to bear alone the cost of this incident and of the resulting modifications that benefitted the entire industry.

* American Aviation Daily, February 11, 1947.

Following the Constellation grounding, TWA was hit by a strike of all its pilots. The strike resulted directly from the adoption by TWA of a pay scale recommended by an Emergency Board of three outstanding men appointed by President Truman under section 10 of the Railway Labor Act. There is no higher authority under that Act for the determination of labor disputes.

Thus, in essence, the two principal unusual troubles
32 TWA encountered during 1946 were the result of its reliance on Government action. It is hardly equitable that the same Government should deny TWA some relief from the losses so occasioned.

IV. Miscellaneous Arguments of Public Counsel.

Public Counsel have discussed neither the applicable principles of administrative law nor the particular statutory provision relating to their motion, but have conjured up all sorts of theoretical arguments against the principle of retroactive adjustments. One of these is that it would cause carriers to become inefficient and uneconomical. Why this is so, Public Counsel do not fully explain, nor do they explain why the *act of filing a petition*, Public Counsel's sine qua non of rate-making, should not stimulate carriers to be even more inefficient and uneconomical thereafter on the assurance that they then are surely taken care of even under Public Counsel's theories. The answer, of course, is that under section 406(b) the Board would disallow items attributable to inefficiency or uneconomy regardless of when they occur.

Public Counsel also throw in the usual Pandora's Box argument—if the Board should grant TWA's petition; it would be flooded with countless others, all of which it would have to grant. Yet it is perfectly obvious that no one urges that retroactive adjustments are justifiable in every case, but only in those unusual circumstances where adjustment is necessary to make rates fair and reasonable over an extended period. The TWA situation has come up only

once since the Civil Aeronautics Act was passed, indeed, only once in the entire history of air transportation in this country—it is hard to conceive that fair treatment in this case will mean a flood of other petitions.

As another argument, Public Counsel urge that TWA is entitled to no relief because the Board denied National Airlines relief for losses due to its accidents and failure to maintain CAA standards. The facts are obviously different, but this argument of Public Counsel serves to highlight the vicious nature of their motion—they insist that TWA be denied the right to a hearing to establish facts on which the Board can rule. Public Counsel could hardly be less deferential to the right of fair trial.

In essence, the position urged by Public Counsel would mean that the Board will always have to fix a rate by guesswork hoping that it will be able to anticipate unusual future occurrences during the period the rate is in effect in order to carry out its obligation under the statute to provide a fair and reasonable rate adequate "to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

In other words, Public Counsel contend that in fixing the rate for the transportation of mail over the TWA routes in Docket No. 1700, in October 1945 the Board should have anticipated that on July 11, 1946 the Constellations were going to be grounded; that for a period of two months they would be wholly out of service; and that for several months thereafter they would be returned to service only gradually as modifications were completed. Furthermore, Public Counsel would require the Board to have anticipated that before all of the Constellations got back into service the entire operations of TWA would be shut down by a pilots' strike beginning on October 21, 1946 and ending on November 16, 1946. The rate-making process urged by Public

Counsel means that the Board would be powerless to protect an air carrier against unforeseen catastrophes. Heretofore, everyone in the air transportation industry has been entitled to believe that with "honest, economical and efficient management" it will have the backing of the Civil Aeronautics Board whose obligation it is to maintain air transportation in the interest of the commerce of the United States, the Postal Service and the national defense. Public Counsel maintain, however, that the commerce of the United States, the Postal Service and the national defense have nothing to do with the question. Principles of rate-making all depend on what time a particular paper called a petition is filed in a certain office of the Civil Aeronautics Board.*

Section 406(c) requires that any petition for fixing fair and reasonable rates shall include a statement of the rate the petitioner believes to be fair and reasonable. This has some meaning. Suppose TWA, as Public Counsel would require it to do, actually filed a petition for an increase in rates shortly after midnight on July 11, 1946 in order that the Board might properly consider the terrific losses resulting from the grounding of the Constellations. What possible reasonable basis could there have been to formulate such a rate? If as a result of guesswork some rate was inserted in such a petition, should it have included provision for the pilots' strike which came three months later? If not, what rate should TWA have inserted in a petition which it should have filed, according to Public Counsel, shortly after 5:00 A.M. on the morning of October 21, 1946 when the pilots went out on strike? The whole subject of

* Certainly the Board has never followed any such narrow legalistic approach. On the contrary, in *Chicago and Southern Air Lines Mail Rates*, 3 C. A. B. 161, the Board, in expressed recognition of "the paramount national needs, not only of the postal service but also of our commerce and our national defense", gave the carrier increased mail pay on its route No. 8 to cover the carrier's losses for the first three and a half months of operations on route No. 53 during which period the Post Office Department had neither dispatched mail nor designated mail schedules on route No. 53. To the same effect, see also *Delta Air Corporation Mail Rates*, 3 C. A. B. 261; *Pennsylvania-Central Airline Corp. Mail Rates*, 4 C. A. B. 22.

rate-making, according to Public Counsel, is pure "guesswork". You should never have actual facts before you; also, according to Public Counsel, if a catastrophe occurs it is in the interest of the commerce of the United States, the Postal Service and the national defense to permit the assets of a company to be dissipated until final collapse rather than to retreat from their principle that the "time stamp" on a rate application circumscribes the power of the Board to perform its obligations under the Act.

V. Conclusion.

In summary, we direct the Board's attention to the fact that the motion of Public Counsel raises only one issue to be decided at this time; namely, whether the Board will hear or refuse to hear TWA's petition. There is no issue at this time concerning the amount of additional compensation, if any, to be paid to TWA in respect of prior periods; such a determination can be made only after the hearing provided for by the Civil Aeronautics Act. However, the absolute right to such a hearing is well established by a long line of Supreme Court cases, and the motion of Public Counsel must be dismissed as frivolous.

In the event the Board has any question concerning TWA's right to the review requested in its petition, oral argument before the Board is respectfully requested.

Chadbourne, Wallace, Parke & Whiteside,
Attorneys for Transcontinental & Western Air, Inc.

Gerald B. Brophy,
George A. Spater,
Of Counsel.

37 Endorsement: Received Docket Section Jun 23 3:36 PM '47 Civil Aeronautics Board.

Amendment to Motion of Public Counsel to Dismiss Petition for Retroactive Rate

Public Counsel hereby amend their motion to dismiss the petition filed herein on March 14, 1947 by Transcontinental and Western Air, Inc. (hereinafter called TWA) insofar as such petition requests an increase in TWA's domestic mail rate prior to the date of the filing of the petition by TWA by adding to the aforesaid motion as paragraph (5) the following:

(5) Once the Board has fixed a final rate for a particular operation, which rate was accepted and has been in effect and unchallenged during a particular period of time, it has no authority to retroactively fix a different rate for the same operation during the same period of time. The Board, therefore, has no authority to grant the petition of

38 TWA, insofar as such petition requests a different final rate effective prior to the date of institution of the proceeding.

Respectfully submitted

WILLIAM C. BURT,
JEROME J. DICK,
Public Counsel.

Washington, D. C.
June 23, 1947

39 CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the attached amendment of motion upon all parties appearing of record in this proceeding by mailing to each said party a copy of

said amendment of motion in a properly addressed, franked envelope.

JEROME J. DICK,
Public Counsel.

Washington, D. C.
June 23, 1947

40 **Notice of Oral Argument**

In the matter of the motion of Public Counsel for denial of the petition of Transcontinental & Western Air, Inc., under section 406 of the Civil Aeronautics Act of 1938, as amended.

Transcontinental & Western Air, Inc., having by petition filed March 14, 1947, requested the Board to fix and determine the fair and reasonable rate of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith over route 2, 38, 44, and 58; and

Public Counsel, by motion filed May 27, 1947, having moved to dismiss the petition, to which motion Transcontinental & Western Air, Inc., on June 13, 1947, filed an answer requesting oral argument before the Board;

Notice is hereby given, pursuant to the Civil Aeronautics Act of 1938, as amended, that oral argument in the above proceeding, with respect to the pleadings above referred to, is assigned to be held on July 16, 1947, 10 a.m., daylight saving time, in Room 5042 Commerce Bldg., 14th St. and Constitution Ave., N. W., Washington, D. C., before the Board.

Dated at Washington, D. C., June 30, 1947.

By the Civil Aeronautics Board:

S/ M. C. MULLIGAN,
Secretary.

(Seal)

41 **Service of Notice of Oral Argument**

Registered:

T. W. A. Att: Secretary, 101 W. 11th St., Kansas City 6, Mo.

Regular:

C. E. Fleming, c/o T. W. A., Hanger #2, Washington National Airport, Washington, D. C.
George A. Spater, Chadbourne, Wallace, Parke, Whiteside, 25 Broadway, New York, N. Y.
James K. Crimmins, Chadbourne, Wallace, etc., 25 Broadway, New York, N. Y.
Robert Sullivan, 1209 Tower Bldg., Washington, D. C.

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42 Endorsement: Received Docket Section Jul 11 4:29 PM '47 Civil Aeronautics Board.

Answer of the Postmaster General in Support of Public Counsel's Motion to Dismiss Petition

To The Civil Aeronautics Board:

The Postmaster General answers and supports the motion of public counsel which seeks the dismissal of that part of the petition of Transcontinental and Western Air, Inc., which requests an increase in its mail compensation effective as of January 1, 1946. In support of public counsel's motion the Postmaster General states as follows:

1. The Civil Aeronautics Board is not authorized by the Civil Aeronautics Act of 1938, as amended, to fix a retroactive rate.

2. That it is contrary to the long and well established policy of the Civil Aeronautics Board to adjust or fix rates of compensation for the transportation of mail for a period during which no rate proceeding is pending.

43 Frank J. Delany, Solicitor of the Post Office Department, or his representative, will present the arguments of the Postmaster General in support of the reasons above specified at the time public counsel's motion is argued. The time to be consumed in oral argument will be governed by the extent to which public counsel covers adequately the law with respect to the above reasons for dismissing petitioner's petition.

Respectfully submitted,

FRANK J. DELANY,
Solicitor of the Post Office Department,
Washington, D. C.

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EXCERPTS FROM ORAL ARGUMENT BEFORE CIVIL AERONAUTICS BOARD, JULY 16, 1947.

83 **Oral Argument by Gerald Brophy on Behalf of TWA**

Mr. Brophy: Mr. Chairman and members of the Board. On March 14, 1947, TWA filed two petitions for a review of the mail rates applicable to its entire system. The first of these is a petition for an order seeking an increase in the temporary rate of compensation for the transportation of mail on its foreign routes, effective February 5, 1946, the date of commencement of service over the foreign routes.

The second petition requests an increase in the rate of compensation for transporting the mail on all of its domestic routes, effective January 1, 1946, the date as of which the rate currently being paid to the company allegedly became unfair and unreasonable.

In both petitions the carrier pleaded for expedited action because of matters of urgency, peculiar to it, of which the members of the Board and everyone connected with the air transport industry are well aware.

By motion dated May 27, 1947, Mr. Burt sought an order denying the petition relating to the domestic routes, insofar as it requests an increase in the rate of compensation
84 as of a date prior to the date of the filing of the petition by TWA. The grounds for the motion were based solely on questions of broad general policy. That motion was wholly defective. We pointed out in our answer to the motion, dated June 11, 1947, that where an administrative agency has jurisdiction over a particular matter, upon which a party is entitled to notice and hearing, it cannot refuse to assume jurisdiction and dismiss or reject a petition without hearing the facts and arriving at a decision based thereon. That, of course, is fundamental and we cited in our answer Supreme Court cases to which many more could be added.

Undaunted, Mr. Burt after ten or eleven days of reflection filed an amendment to his motion, this time requesting dismissal of TWA's petition insofar as it requests an increase on the domestic routes, prior to the date of filing, on the ground that the Board does not have the authority to grant a different rate from that currently being paid, effective prior to the date of the institution of the proceeding.

Thus the only reason why we are here today is because your power is contested. We are not here to determine whether the Board should, as a matter of policy, authorize a change in rates effective prior to the filing of a petition by the carrier. That is a question upon which all parties in interest are entitled to produce evidence at a hearing, on the basis of which you may make your policy decision. But we cannot be denied a hearing on this and all other relevant facts if you have jurisdiction over the sub-
85 ject matter of this petition.

It is of no consequence whether you choose to solve this question by looking merely at the specific language of Section 406 of the Act or whether you choose to consider it in the light of the Act as a whole and your responsibilities thereunder to the air transport industry and to the country. The answer is the same no matter which course you take in resolving this problem.

I believe it is a fair observation that Mr. Burt regards this as an academic question based purely on the language of Section 406 and for that matter only on Section 406 (a) of the Act without regard to your obligations under Section 406 (b) or your responsibilities in upholding the public interest as defined in Section 2.

I would like to show first how you cannot possibly perform your functions under the Act if you accept this narrow view.

Chairman Landis: Before you go into that, Mr. Brophy, may I get this position clear in my mind. That is in the nature really of a demurrer to your petition and consequently as a matter of pleading, we should take as true your statements, your allegations that are contained in that petition, that the rate existing rate was unfair and unreasonable from January 1, 1946 on, and that is the way we should approach this case.

Mr. Brophy: Yes, from a proceeding pleading standpoint, yes.

Mr. Ryan: This then fully satisfied your point as to the hearing—this oral argument upon the motion.

86 Mr. Brophy: Oh, no, not by any means.

Mr. Ryan: That is what I wanted to get.

Chairman Landis: I understood you whittled it down to the pure legal question and it is a pure legal question and it is in effect a motion to dismiss because of the—

Mr. Brophy: But we are entitled to a hearing on the whole petition.

Chairman Landis: I just wanted to get your position.

Mr. Brophy: For the last nine years everyone in the country has believed that the Civil Aeronautics Board has

been vested with all of the means necessary, in the public interest, for the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense. That is your mandate from the Congress.

In order to discharge this responsibility you have been given the power to administer the subsidy provided by the Act if subsidy becomes necessary to achieve the objectives of the Act. More than that, you have been told in Section 406 (b) that in determining the rate of mail compensation in each case you shall take into consideration the need of each carrier for compensation for the transportation of the mail sufficient to insure the performance of service, and, together with all other revenue of the air carrier, to enable it "under honest, economical and efficient management" to maintain and continue the development of air transportation to the extent and of the character and quality
87 required for the commerce of the United States, the Postal Service and the national defense.

There is not a single word of limitation on your power in Section 406 either as to the amount of mail compensation or the period for which it may be paid. In fact, there is no limitation of any kind on your powers, except that you must only give to the carrier a rate which will enable him to operate properly under "honest, economical and efficient management". Therefore, we must not lose sight of the fact that we are dealing with a subsidy statute not a rate making statute.

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115 The sole question involved here today relates to power and not policy or discretion. You are not called upon to decide today whether TWA should have filed a rate petition earlier than it did or whether the items for which they seek reimbursement are just or not. These are questions which will be resolved at the hearing on
116 the full petition and you cannot decide as a matter

of policy whether you should exercise your power until the last bit of evidence in the entire case has been submitted and the last words of argument have been presented before you. You cannot segregate issues in a matter such as this and say in advance that the evidence which would be material on this question can be delimited or circumscribed.

You cannot adopt a hard and fast rule of policy that will be applicable to all cases because the facts have varied in the past and will continue to vary in a world of changing conditions.

Just as you found it proper, as a matter of policy, to award retroactive pay to the date of commencement of operations on a single new route, just as you found it proper, as a matter of policy, to award retroactive pay on old routes to the date of inauguration of service on a new route which came into a particular system, so also may you find that your discretion should likewise be exercised in a case involving an unforeseen and unpredictable catastrophe the duration and effect of which could never be known until it had run its full course. So also may you find that a host of other circumstances merit the exercise of your discretion. The important thing is that you are masters of your discretion and the mere recognition of your power does not require you to exercise it except in proper cases.

The rate of compensation for the transportation of the mail on TWA's domestic routes was fixed by order
117 of the Board in Docket No. 1700, dated October 26, 1945, effective January 1, 1945.

In November 1945, the first full month following the decision, TWA lost money. I am at a loss to find the profits that Mr. Burt referred to that accrued to TWA after the decision.

In December 1945, TWA lost more money. Nevertheless, in justice to any mail rate, it should be tried out over a sufficient period of time to be able to tell whether it results

in fair and reasonable compensation under honest, economical and efficient management or whether it is wholly unreasonable. Therefore, I don't think they should have filed an application for a revision of the rate because of the losses in November and December, nor do I think it was incumbent upon the Board for that matter, under Section 406 upon its own initiative or upon the Postmaster General also under Section 406 to ask for a review of the rates which thus far were nevertheless inadequate to provide over-all compensation which Section 406 contemplates.

Mr. Lee: If the carrier is guilty of being too slow on the uptake, does the Board then have the duty of opening the case on its own initiative and fixing a fair and reasonable rate?

Mr. Brophy: The Board has the power to do it. The Board, I don't think has the duty.

Mr. Lee: It would have the duty if it was impairing the carrier, wouldn't it?

Mr. Brophy: Most certainly. It would also have the duty any time the Board wants to look at the financial condition or the rates being paid to a particular carrier, they would have the power to open it up.

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Mr. Lee: They have the power under your theory announced a while ago, the Board has the duty also to use its power of initiating rate, a new rate in order to carry out the purposes of the Act as set forth in Section 2.

Mr. Brophy: I think there are situations when the Board might have that obligation in order to perform its responsibilities under the Act, Mr. Lee. All I am saying is that you are certainly not precluded from doing it whether you want rates to be increased or decreased. I don't think you can sit back and let a carrier dissipate its operations to the point where the development of air transportation system contemplated by the Act may be retarded.

In those situations I think it would be your duty, but the point again that I am emphasizing is what your power is, how you exercise it based on all the facts.

Mr. Lee: Wouldn't any substantial loss impair the carrier in performing its duty and service?

Mr. Brophy: It depends on its overall financial situation. Merely a loss over a given period of time would not necessarily mean that the carrier or the Board or the Postmaster General must become alarmed and initiate a rate proceeding.

Chairman Landis: But on the basis of the Western and the Northeast cases what you are really arguing is that the category of the grounding of Constellations is at least comparable to the category of opening up a new
110 route.

Mr. Brophy: Exactly.

Mr. Ryan: At any rate, the question whether the petitioner here has been guilty in no way affects the Board's legal power.

Mr. Brophy: None whatsoever.

Mr. Ryan: I take it you were discussing it not because it was relevant but some of us raised the question as to why the carrier hadn't filed suit.

Mr. Brophy: That is right. In January 1946 TWA lost even more money and this is when all of the airlines in the country were becoming seriously involved.

Then on February 5, 1946, operations were started on the newest addition to the TWA system, the foreign routes. On that date, as a result of everything the Board has ever said before or since, the rates applicable to the entire TWA system, domestic and foreign, were open to review.

There has not yet been a formal review of TWA's international operations. The company has only a temporary rate set in October 1946 which did not take into account the propriety of the allocation of expenses between the domestic and foreign routes of TWA but was merely a device, which is still in effect, for providing some money to the international carriers pending the establishment of a permanent rate.

Nevertheless, despite the fact that a rate had not yet been fixed for the international division, beginning in March 1946 losses in TWA's operations began to decline.

Although losses still were suffered during April and
120 May they were still declining. In June the turn came and operations were profitable.

On July 11, 1946 the first catastrophe occurred with the grounding of the Constellations.

Suppose, at that time, service on the international routes had not been inaugurated and suppose also that the Board had not previously said that, as a matter of policy, you would not adjust rates effective prior to the initiation of proceedings, which you have never said. In that event, Mr. Burt maintains that you have absolutely no power to consider whether TWA should be compensated for the dire results which followed because at 12:01 A.M. on July 11 somebody wasn't at your doorstep with a paper called a petition for an increase in rates based upon what might happen depending upon the duration of the Constellation grounding and the effect that it would have on general passenger acceptance. But remember, at that time the entire TWA system rates were open to review by your own pronouncements by reason of the inauguration of service on the new international routes commencing February 5. Moreover, in the entire history of air transportation in the United States, there had never been a more "unusual circumstance" affecting any air carrier or group of carriers than the grounding of the Constellation and the subsequent pilots' strike.

To have filed a petition on July 11, 1946 based upon the catastrophe resulting from the Constellation grounding would have disregarded and flaunted Section 406 (c) which requires that any petition shall include a statement of the

rate the petitioner believes to be fair and reason-
121 able. No one could know what rate was fair and reasonable until the Constellation ultimately got back in service and some knowledge was had of the dam-

age done in the public's estimation of the safety of that airplane. Section 406 (c) is in specific language and means something. Surely Mr. Burt does not mean that this language should be disregarded although he does want you to give effect, in your construction of Section 406 (a), to language which isn't even in the Act. But events made such an appraisal of a fair and reasonable rate impossible, at that time, because before all of TWA's Constellations were back in service the pilots' strike occurred as a result of which TWA's operations ceased entirely throughout the world. There are two things that we should keep in mind in connection with these two catastrophes. First, that the grounding of the Constellation occurred as a result of the Governmental order issued by the Civil Aeronautics Administration and the strike occurred because TWA put into effect the rates of pay recommended by the highest Governmental tribunal on labor matters under the Railway Labor Act, the special fact finding board appointed by President Truman, after every procedural step under the Act had been exhausted.

I refer to the fact that the Constellations were grounded by order of the Civil Aeronautics Administration on July 11th because at that time the Civil Aeronautics Board, as well as the carrier, could not possibly have anticipated the duration of the grounding or the extent of the damage that the carriers affected would suffer. If you had, as a consequence issued an order in anticipation of the effect
122 of the grounding, you would have been exercising the discretion or the power in discretion that I think you have under the Act.

Well, despite the fact that June of 1946 was a good month, the grounding of the Constellations and the pilots' strike ruined the balance of the year. With the annual audit completed and the internal situation in TWA somewhat resolved, it was possible to appraise the loss resulting from the grounding and the pilots' strike and thus form some basis for a petition for review of the rates, since ac-

tion on the permanent rate for the foreign routes was something that apparently would not come up for some time. Actually the figures showed that the losses during 1946 resulting from the grounding and the strike alone exceeded ten million dollars (10,000,000) and it was possible to formulate some idea of what a fair and reasonable rate would be in compliance with Section 406 (c) of the Act. Consequently, the petition for a revision of the domestic rate, effective as of January 1, 1946, the date as of which we believe we can establish it to be unfair and unreasonable and the petition for an increase in the temporary rate being paid for the transportation of mail on the foreign routes were filed on March 14, 1947.

There is no such thing as an estoppel which would deprive the Board of its jurisdiction on its own initiative, or upon application of the Postmaster General, or upon application of an air carrier, to review rates over a past period, to determine new rates and to make such rates effective from such date as it shall determine to be proper.

The carrier is entitled to fair and reasonable rates
123 of compensation for the transportation of the mail
and sufficient to enable it to carry out its obligations, and the Government is obligated to pay fair and reasonable rates in order to accomplish that purpose.

The very idea of estoppel depriving the Board of its jurisdiction is negated by the provision of Section 406 (a) which empowers and directs the Board to fix fair and reasonable rates on its own initiative. This does not mean that the power and responsibility of the Board to initiative proceedings is limited to a proceeding looking toward the reduction of a rate because the ultimate responsibility of the Board is to encourage and develop a system of air transportation contemplated by the Act.

Moreover, in this case particularly, the carrier had before it, on which to rely, the past decisions of the Board that with the establishment of a new route the rates of the entire system are subject to review and the declarations by

the Board that it is policy, and policy alone, which has determined their decisions in previous cases.

The question has been raised as to the constitutionality of any action by the Board in refusing to adjust unfair and unreasonable rates which became such prior to the initiation of proceedings. I personally believe that the mere analysis of the Act itself reveals arguments so overwhelming that the constitutional point can be considered as cumulative rather than the main support of our position.

However, I believe the constitutional point is absolutely sound. TWA had a contract with the Government, under the Air Mail Act of 1934, for the transportation of
124 the mail and agreed also to furnish passenger and express service in connection therewith. Under that contract it could abandon its responsibilities without penalty on sixty days' notice. The Civil Aeronautics Act held out to it the promise that if it assumed the obligations of a certificate of convenience and necessity it would receive fair and reasonable compensation in accordance with the standards prescribed in Section 406 (b). Moreover, in giving up a contract from which it could have withdrawn voluntarily on sixty days' notice, the carrier assumed the obligations of a certificate from which it cannot withdraw unless permitted by the Board under Section 401 (k) of the Act.

In fact, any carrier which assumes the responsibilities of a certificate does so on the promise of the benefits of Section 406 (b) and these cannot be denied the carrier as a matter of law.

It is of no consequence that you may call Section 406 (b) a subsidy. It is part of the promise to the carrier for performing its obligations under honest, economical and efficient management. The decision of the Supreme Court in United States v. Northern Pacific Railway Co., 256 U. S. 51 (1921) establishes this beyond question. In this case, the court held that a grant of lands by Act of Congress to the railroad in exchange for its agreement to extend its

lines was a promise binding on the government and the lands so promised could not be diverted by the government to other uses. The court said that "Such rights are within the protection of the due process of law clause of the Constitution."

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133 I would like to comment if I may, on the remark made in the early part of Mr. Burt's argument. I think you will agree this is a purely jurisdictional question. After the motion was made, Mr. Burt made what I thought was a frantic attempt to get us into some kind of a hearing on a limited question as to whether the Board should exercise its policy in this matter.

There is no such thing as a limited hearing on this question because you can't decide this. If you agree that you have the power and it is a matter of discretion, then everything that goes into a rate case is material and you can't pick out an issue here and one there. The motion was not our motion; it was his, and frankly, I don't think it ever should have been made, but that is neither here nor there. I was a little disturbed if not annoyed at the comment that full and fair opportunity had been given us for a hearing. That is not so.

Mr. Ryan: Are you referring to this last motion?

Mr. Brophy: I am referring to the motion that raised first the policy question and as amended, to raise the jurisdictional question.

Mr. Ryan: So that your position procedurally would be if you went ahead after this motion could only be disposed of—I mean the amendment to this motion is the only thing to be disposed of at this stage so then you would
134 have left the rest of the motion, the motion as to the exercise of policy and also the merits of the rate proposed.

Mr. Brophy: I think the question of the motion relating to policy has to be dismissed as a matter of law because

we are entitled to a hearing and that involves the Morgan Case and everything else and cases long before the Morgan case.

Mr. Ryan: I agree with you personally that he can't dispose of that policy motion in that case [instance].

Mr. Brophy: And you can't do it in any small hearing because there are no issues to segregate. Everything we say on that case is bearing on the issue whether you should exercise your discretion.

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135 Mr. Ryan: You referred to the Constitutional question. Is it your position that the Constitutional question involved here is one of substantive confiscation or is it the question of the denial of the carrier of the benefits prescribed by the Statute? In other words, the
136 Board denied due process by not adhering to the provisions of the Statute.

Mr. Brophy: It is the latter.

Chairman Landis: I have difficulty in reconciling that point of view if you put it on a Constitutional basis and then say—well we have the discretion to go in. If it is on a Constitutional basis, you almost eliminate discretion on our part. If you establish the Constitutional basis, then it becomes almost mandatory on your part to go in.

Mr. Brophy: Remember, I am speaking to this motion, Mr. Chairman, and this motion—

Chairman Landis: I recognize you didn't drive the Constitutional point. I always have had difficulty in seeing how you can have on one side a flexible policy and on the other hand an inflexible Constitutional obligation. The two don't jibe.

Mr. Ryan: Would the question of the Constitutional right to look a gift horse in the mouth be involved here also? That is, whether or not you can have a Constitutional question where a subsidy is involved.

Mr. Brophy: This isn't a gift horse, Mr. Ryan. We undertook the obligations under the Act and were promised

benefits of the Act that you have available to give us and that is not looking a gift horse in the mouth and I think the Supreme Court case that I cited shows that very clearly.

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140 **Oral Argument of Roy C. Frank, on Behalf of the Post Office Department**

Mr. Frank: Mr. Chairman and members of the Board, the Post Office Department does not intend to make a legal argument at this time. The legal points have been adequately covered by public counsel and by Mr. Brophy, representing TWA. The Post Office Department does wish to state its position, however.

We would like to see the motion granted. We feel that the Board does not have the legal authority under the Act to take the action that TWA requests. We would like to concur in all of the legal arguments made by public counsel. We agree with the points made by him, and we would like to adopt as far as we can the legal argument made by him as our argument.

The Post Office Department does have certain practical difficulties in this matter, that I believe the Board ought to take into consideration, not in determining what the policy should be, but in determining what the law means. I can see a difference between practical effects that go to policy questions, and practical effects of a law that goes to interpretation of the law.

I believe the rule is that in construing ambiguous law that the court, or in this case the Board, has to de-
141 termine and has to decide the ambiguity in such a way that the law will be given its practical effect and will not lead into any administrative or practical difficulties.

A construction here as contended by TWA will lead into a number of practical administrative difficulties not only for this Board, but also for Congress and for the Post Office Department, particularly the Post Office Department.

If the Board should decide that it has the power to fix rates previous to the date of the filing of the petition, it will mean that the Board will never grant a final rate. Every rate that the Board grants will be a temporary rate. And in effect, after a certain period of time has elapsed, whether it be six months or a year or two years, depending upon when the Board on its own initiative opens up the question, or a carrier petition, or the Post Office Department comes into the case, the Board will then have to determine what the rate should have been for that particular preceding period of time. That is the only way that the Board then will ever be able to establish a final rate. I may say even that rate will not become final because there may be certain circumstances overlooked at the time of that hearing, that the carrier or the Department or the Board could show, and the further rate would be established.

The practical difficulties confronting the Post Office Department and Congress in this matter would be in connection with then Budgetary appropriations. It would be impossible for the Post Office Department to approach
142 Congress and make recommendations as to what the Budget should be for any particular year. At that, the Department would have to tell Congress that we anticipate it will be so much, but we never know what air line carriers are coming in asking for additional increases of $11,000,000, $14,000,000, $20,000,000, we are only giving a guess, and that is not a very good guess. It would be worse than the guess we are giving today.

Congress at the present time is very impatient at the present system of granting temporary rates, and a year or two later granting the permanent rates as now fixed. I think that was brought out by Commissioner Branch to some extent.

I have a quotation from Committee Report No. 557 under date of June 11, 1947. I think that is the report referred to by Commissioner Branch to some extent. I would like

to read it, however, to get it into the record to show what the present indication of the Appropriation Committee in Congress is under the present system. I venture to say if the system were opened up so we could go back three or five or six or seven or eight or nine or ten years, that Congress would look with even more disfavor upon that kind of a policy.

I bring that out, gentlemen, not for any other reason except this. I think we have a right to look at the present interpretation and the present sentiment in Congress as to what Congress means by this Act, what Congress means by the language in this Act, what the standing is of our lawmakers.

143 The quotation I wanted to read is as follows: It has to do with the various items for foreign air mail transportation which total $33,000,000. The quote is as follows:

"The committee regrets exceedingly that the Post Office Department is not able to present a definite statement as to the amounts that will be involved in final settlement of these items. The Post Office Department cannot, however, make this determination until the Civil Aeronautics Board has made a determination of the amount to be allowed to the carriers. It is disconcerting, to say the least, to be faced with this situation two years after the close of fiscal year 1945. The rates covering that period are not yet determined, and the present amount is appropriated on the basis of temporary determination by the Civil Aeronautics Board. The only reason for making the appropriation is in order to make payments on account to the carriers so they may maintain service. The committee feels very strongly that the policy of the Civil Aeronautics Board in deferring rate making is entirely out of line with the necessities of the situation, and that the rates can be more readily determined with adequate safeguards for the federal treasury."

The Post Office Department, if rates could be fixed back of the date of the petition, could never close its books. It would have to keep its books open for a very indefi-
144 nite period of time. We would never know what deficit we had for the year, or what surplus, if any, we had for a particular year. We would never be able to go before Congress and state that we feel that the 5 cent rate of today should be reduced to 4 cents on the basis of the operating costs for 1947, or that the rate should be raised to 6 cents on the basis of the losses for 1947. We would have to say, "We do not know what the loss is going to be, we don't know what the profits are going to be, because in 1950 the Board can open this matter up and can state for 1947 we have to pay out another $10, $20 or $30 million." We will never know where we are at any particular time.

A further difficulty that the Post Office Department will be placed to is in the cost ascertainment procedure. The Post Office Department has built up over a period of many years a very elaborate system of cost ascertainment. That system is used in these cases. We come in, we tell the Board, and we present figures to the Board to show that in the year 1945 the cost of various services is such. The Board then relies upon those figures for 1945 in determining the rates that they will fix in the future. If the contention of TWA is accepted, it would result in that kind of a situation. The Board relying on the cost ascertainment figure for 1945 would fix rates for 1946, let us say, or 1947. In 1948 the Board would go back to 1945 and would allow another $10,000,000, which would mean that the figures that you used to fix the 1946 and 1947 rates were false figures.

Chairman Landis: I have never seen a case where
145 the Board has used the cost ascertainment figures of the Post Office.

Mr. Frank: I had assumed that a good many of the figures that we have relied upon in our exhibits and figures that we have furnished the carriers in these various cases

have been taken from our records and from our cost ascertainment figures. For example, our costs in various systems. I have been informed that, Mr. Chairman, and I believe in some cases that has been used. In fact, I believe I have seen some exhibits. I am trying to recall which ones. There has been a footnote to the effect that the exhibits were based on figures submitted by the Post Office Department, which would have to have been taken from their cost ascertainment figures. I say that as a matter of recollection and not being able to point to the specific example.

Chairman Landis: The cost ascertainment figures show this, do they not, they show the actual cost to the Post Office?

Mr. Frank: That is right.

Chairman Landis: Of carrying this mail?

Mr. Frank: That is right.

Chairman Landis: And they are worked up on the basis of your surveys every three weeks at odd intervals?

Mr. Frank: That is right.

Chairman Landis: Actually, the cost of carrying the mail, except where this Board goes into an overall service rate problem, is not of much importance in the rate
146 making picture.

Mr. Frank: Except that this Board stated in the Helicopter Case in Los Angeles, that they thought the cost was a little high, but they would give it a test.

Chairman Landis: That is right. Where the cost ascertainment figures seem to me to have great importance is not so much in the mail rate cases, mail pay cases, perhaps where they ought to have far greater emphasis than they are given by the Board at the present time is in your route cases, how much is this going to cost the government of the United States.

Mr. Frank: To get back to that, Mr. Chairman, that exactly emphasizes the point I was making, regardless of whether the cost ascertainment figures are used in route cases or rate cases, if the Board relies upon a false figure

that is furnished by cost ascertainment to establish a route, the Board is at the same disadvantage, and the carriers are at the same disadvantage as though it were used in a rate case. It does not make any difference what type of case it is used in. The mere fact that these figures can never be relied upon as being the actual cost for this particular year, because they can always be increased subsequent to the time you have used them.

Chairman Landis: I was not trying to argue with you on your point, but, rather, was perhaps indicating that the cost ascertainment figures ought to be used by the Board much more than it does.

Mr. Frank: I certainly appreciate that statement,
147 Mr. Chairman, because we contend that too.

The Post Office Department also faces a further practical difficulty. In recomputing the amounts due the carrier under any future increased rates, we would have to go back, and we would have to recompute the amounts of mails that have been carried. We would have to recompute the amounts that are due to the air carriers. It is a difficult and expensive operation. Some of these cases, I am informed, by the second assistant's office, that the basic data used is not available or in proper use in connection with the new rate. After a period of time it has been used for other purposes. It has been sent here and there and the exact figures have not been kept as a matter of permanent record.

It would appear to me that these difficulties that we would be faced with ought to be considered in connection with the determination of what Congress had in mind at the time this Act was passed. I do not think Congress had in mind that the government agency that was footing the bill, so to speak, would be placed in a position where it would never know when its liability ceased, when it would always have to keep its books open for additional costs, when it could never determine its own budgetary requirements for the carrying out of these payments at any par-

ticular time, and when generally the whole question would be left up in the air and the final rate never determined. I cannot conceive that Congress ever had that in mind.

There may be answers to the problem as to how
148 the air carriers can secure the losses that they have incurred, losses that they did not expect. I do not think we are concerned at this time as figuring out that problem. That is a bridge that we have to cross when we get to it. The only bridge we have to cross today is a bridge as to whether this Board here can make rates retroactive from the date of the petition. I think if we cross that bridge, we will be doing well and we should not worry about the future.

If there are any further questions, I would be glad to answer them if I can, if not, I have said everything that the Post Office Department wishes to say at this time.

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176 **Opinion**

E-1032
E-1033

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Served: Dec. 5, 1947.

Docket No. 484.

PENNSYLVANIA-CENTRAL AIRLINES CORPORATION

Docket No. 2849.

TRANSCONTINENTAL & WESTERN AIR, INC.

Decided: December 2, 1947.

Motions to dismiss mail rate petitions insofar as they request the fixing of mail rates to be effective prior to petition filing dates granted.

The Civil Aeronautics Board does not have the legal authority to fix a new rate for an operation during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding. (p. 8)

The language of section 406 of the Act is similar to that normally used in granting authority to make public utility rates which are traditionally applicable only to the future, and is almost identical with the language of the earlier mail pay acts which language has never been given the retroactive construction contended for by respondents herein. (p. 9)

Consideration of the provisions of the Civil Aeronautics Act of 1938 indicates that a major purpose thereof was the application of public utility regulatory principles to the airline industry. (p. 10)

It is firmly established law that a public utility rate deals only with the future and is not concerned with reimbursement of past losses nor recapture of past profits which have proved excessive. It offers only an opportunity to earn a fair return, and it does not guarantee that such a return will, in fact, be earned. (p. 11)

The first sentence of section 406 of the Civil Aeronautics Act is substantially identical to the related statutory enactments in the fields of railway and air carrier mail pay found in the Railway Mail Pay Act of 1916 and in the Air-
mail Acts of 1934 and 1935. None of these acts has
177 been held to confer a retroactive mail rate-fixing authority. (p. 9)

There is nothing in the legislative history of the Civil Aeronautics Act to indicate an intention that the Act contemplated a retroactive rate-making authority such as is contended for by the respondents. (p. 14)

The fact that the Board is directed in fixing mail rates to consider the need of the carrier for revenue sufficient together with all other revenue to enable it to achieve certain statutory objectives does not confer retroactive power

but merely directs the Board, in fixing a rate for any period, to consider factors not ordinarily considered by other rate making agencies. (p. 22)

The contention that such retroactive power is *essential* to carry out the purposes of the Act cannot be accepted. Such retroactvie authority would be definitely harmful in the administration of this Act and would radically change the fundamental principles upon which the Act is based. (p. 22)

Authority to reimburse for past losses would carry with it authority in the Board to recapture excessive profits. (p. 23)

Where there is no mail rate in effect for a new route the Board must consider mail pay requirements arising as a result of such new operation from the date mail service begins thereon, irrespective of the date on which mail rate proceedings are initiated. (p. 26)

While this Board has consistently recognized the developmental responsibilities placed upon it by the Civil Aeronautics Act of 1938, its administration of the mail pay provisions of the Act has uniformly recognized that basic principles of public utility rate-making apply to the fixing of mail rates. (p. 26)

In its rate decisions the Board has always assumed that risk of loss, should rates prove inadequate, would fall upon the carrier, and it has allowed a rate of return commensurate with the risks that appear to be involved. This concept of providing payment for risk in the rate of return is diametrically opposed to the principle of reimbursement for past losses. (p. 27)

178 There is no indication in the entire legislative history of, or in the Civil Aeronautics Act itself, that a guarantee of carriers against losses incurred under rates found fair and reasonable by traditional public utility rate-making procedures was intended or thought necessary to accomplish the development purposes of the Act. (p. 29).

The Western case did not hold that the Board would fix

retroactive rates in any case of unusual circumstances but only that where there is no mail rate in effect for a new route the Board will consider mail pay requirements arising as a result of such new operation from the date mail service begins thereon. This doctrine is not applicable to the petitions of TWA and PCA. (pp. 24 and 34)

Motions of Public Counsel to discuss respondents' mail rate petitions insofar as they request the fixing of mail rates to be effective prior to the filing dates of those petitions granted, and said petitions to that extent, dismissed. (p. 35)

Appearances:

Gerald B. Brophy and *George A. Spater* for Transcontinental & Western Air, Inc.

Charles H. Murchison and *Robert Hankins* for Pennsylvania-Central Airlines Corporation.

Frank J. Delaney, Roy C. Frank and *Louis J. Doyle* for the Postmaster General.

William C. Burt, Jerome J. Dick and *Robert E. Redding*, Public Counsel.

179 OPINION.

By the Board:

This opinion disposes of motions by Public Counsel in two proceedings. The first is a motion to dismiss the petition filed on January 14, 1947, by Pennsylvania-Central Airlines Corporation, hereinafter referred to as PCA, insofar as it requests the fixing of a mail rate retroactively from June 1, 1942 to January 14, 1947, the filing date of its petition. The second is a motion to dismiss the petition of Transcontinental & Western Air, Inc., hereinafter referred to as TWA, insofar as it requests the fixing of a mail rate retroactively from January 1, 1946 to March 14, 1947, the date of filing its petition.

Although the two petitions present superficial differences and although the motions were argued separately, we are of the opinion that the basic considerations applica-

ble in each case are substantially the same, and we are, therefore, disposing of both in this opinion.

The TWA petition is a simple request to fix a mail rate for its domestic operations on and after January 1, 1946. During the period between January 1, 1946 and the date of its petition it was receiving mail pay for these operations in the amount of 45 cents per ton-mile under a rate theretofore fixed by final order of the Board (Order Serial No. 4151) issued October 26, 1945.[1] Under this rate, Transcontinental & Western Air, Inc., received mail pay in the amount of approximately $3,541,000 for operations between January 1, 1946 and March 14, 1947, the period for which it here seeks additional mail pay in the amount of approximately $11,157,000.

180 PCA's petition in terms asks for reconsideration, rehearing and reargument with respect to the 60-cent per ton-mile rate fixed for its operations by Order (Serial No. 2077) issued December 16, 1942.[2] For the period June 1, 1942 to January 14, 1947, PCA requests approximately $5,000,000 mail pay in addition to approximately $1,700,000 already received for this period under that Order. Despite its form, Public Counsel considered the petition of January 14, 1947, as an original petition to fix rates on and after June 1, 1942.

Public Counsel's initial motions proceeded on the ground that the fixing of a new mail rate for a retroactive period for which a final mail rate had been in effect and unchallenged would violate a well-established policy of the Board. By subsequent amendment of his motion in each proceeding, Public Counsel questioned the Board's legal authority to fix a rate for such a past period.

[1] TWA Mail Rates, 6 C. A. B. 595 (1945). This was a service rate which was fixed at this time for each of the "Big Four": American Air, Mail Rates, 6 C. A. B. 567 (1945); Eastern A. L., Mail Rates, 6 C. A. B. 551 (1945); United A. L., Mail Rates, 6 C. A. B. 581 (1945).

[2] PCA Mail Rates, 4 C. A. B. 22 (1942). This was a service rate which was made applicable to the so-called "Little Six": Braniff Airways, Mail Rates, 4 C. A. B. 588 (1944); Chicago and Southern A. L., Mail Rates, 4 C. A. B. 529 (1943); Delta Air Corp., Mail Rates, 4 C. A. B. 501 (1943); Northwest Air, Mail Rates, 4 C. A. B. 515 (1943); Western A. L., Mail Rates, 4 C. A. B. 441 (1943).

In our opinion, the position taken by Public Counsel with respect to the nature of PCA's petition is correct. That petition must be considered as initiating a new proceeding, rather than as a continuation of the proceeding which resulted in the opinion and order of December 16, 1942. PCA relies on the following language in that opinion, as giving it a right to reconsideration upon petition filed January 14, 1947, more than four years after that order and opinion were issued:

". . . Accordingly, we shall fix rates herein to become effective June 1, 1942, with the understanding that upon respondent's request filed pursuant to rule 8 of the Rules of Practice, they will be subject to reconsideration from and after that date." (p. 22) But Rule 8,[3] referred
181 to in the opinion specifically provided that a petition for rehearing, reargument, or reconsideration was required to be filed within fifteen days of the order sought to be vacated or modified.

PCA contends that applicability of the 15-day limitation could not have been intended; that if applicable, the language accomplished nothing, since it conferred no right in addition to what PCA would have had in any event under Rule 8. This analysis fails to note the very substantial right which the language in fact conferred on PCA. In June, 1942, circumstances affecting the commercial air transport industry, and arising out of military requirements, caused the Board to adopt measures and follow procedures designed to afford the carriers partial assurance

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[3] Rule 8 of the Rules of Practice, issued April 28, 1939, and in effect December 16, 1942, provided:

"Any party may petition for rehearing, reargument or reconsideration of any final order by the Authority [Board] in a proceeding, or for further hearing before decision by the Authority [Board].

. . .

"Such petition for rehearing, reargument, or reconsideration must be filed within fifteen days after service of the order sought to be vacated or modified and shall be served by the petitioner upon all parties to the proceeding or their attorneys of record."

against substantial but unpredictable losses incident to enforced curtailment of commercial operations.[4]

182 Consistency with the announced procedures of the Board required that PCA's rate be reconsidered by the Board upon request therefor within 15 days after issuance of the Board's final rate order. By the language of the opinion, PCA had an absolute right to reconsideration of its mail rate upon request therefor filed within 15 days. This was a different and substantially greater right than that conferred by Rule 8 to petition for reconsideration, a request which might be denied in the proper exercise of the Board's discretion. Since PCA's right to reconsideration upon petition filed therefor was limited by the 15-day pro-

[4] The proceeding culminating in the rate opinion of December 16, 1942, was begun by order dated October 8, 1940. The hearing was conducted four months prior to Pearl Harbor. In May 1942, the armed forces took over a substantial portion of the planes of the domestic carriers, and severe restrictions affecting service patterns of all carriers, including PCA, were imposed. In order to protect carriers against undue losses which might be occasioned by these restrictions, we issued two general memoranda to the industry, the first on May 22, 1942, and the second on June 3, 1942. The first memorandum proposed that all rates after May 31, 1942, be temporary. This was superseded by the second memorandum, which provided that any carrier with no pending rate case could file a petition within two weeks after June 3, 1942, and such petition would be considered filed as of June 1, 1942. Should a petition be filed, it was proposed that a show cause order would issue *after* sufficient experience had been accumulated under the new service pattern, proposing a new rate back to the petition date, June 1, 1942. As to those carriers, like PCA, who had cases pending, we stated that we would proceed to fix final rates.

The proposal under the second memorandum might conceivably have been unfair to a carrier with a pending case if insufficient experience under the new service pattern had been accumulated at the time final rates were fixed for it, since any petition thereafter filed for a new rate could only result in relief from the date of the petition, and not from June 1, 1942. Under these circumstances PCA petitioned to have a temporary rate fixed for the period after June 1, 1942.

At the time the December 16, 1942 order was issued we had before us, by stipulation, the record of four months' operations under the new war service pattern. We accordingly proceeded to fix a final rate for the period after June 1, 1942, despite the petition of PCA for a temporary rate. However, to place PCA in as favorable a position as those carriers which had no case pending on June 1, 1942, we provided that PCA might have reconsideration of the final rate for the period after June 1, 1942, upon request filed under Rule 8. Under this provision, if PCA should believe that the experience upon which the post June 1, 1942 final rate was fixed did not adequately reflect the new pattern of operations, it could, if it made request therefor within 15 days, have reconsideration of that rate as of right. It was thus placed in as favorable a position as the carriers which had no petition pending on June 1, 1942, and who were given two weeks in which to petition for a new rate after June 1, 1942.

[5] See note 4, *supra*.

vision of Rule 8, its petition of January 14, 1947, must be construed as initiating a new proceeding to fix a rate for a retroactive period. It accordingly raises the same basic issues as does the TWA petition.

183 After full consideration of the Act, and of its legislative history,[6] and of the arguments of counsel on the motions, we are of the opinion that as a matter of law we do not have the authority to fix a new rate for an operation during a period in which a final rate previously fixed by us was in effect and unchallenged by the initiation of a mail rate proceeding.

Section 406 of the Act, which sets forth our mail rate-making duties and powers contains two provisions which are important in determining our authority. The first "empowers and directs" us upon our own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft." The second empowers and directs this Board "to make such rates effective from such date as it shall determine to be proper."

The respondents in effect contend that the second provision is a clear and unambiguous grant of authority to fix new rates for any retroactive period even though previously fixed final rates may have been in effect and may have constituted the basis for presumably final payment to the carrier, and that the statutory language therefore leaves

[6] In considering the legislative history we are concerned not only with the bills introduced in the 75th Congress, 3rd Session, H. R. 9738 and S. 3659 and S. 3845 (which bills were "fundamentally the same," Cong. Rec. Vol. 83, part 6, p. 6725), which became the Civil Aeronautics Act of 1938, but with two sets of earlier bills in the 1st Session of the 75th Congress, H. R. 5234, and S. 2, identical bills covering economic regulation, and H. R. 4652 and S. 1760, identical bills covering safety regulation. After extensive hearings had been held on the earlier bills which proposed to vest the regulatory power in the Interstate Commerce Commission, and before they could be brought to a vote, the later bills, embodying most of the substantive provisions of the earlier bills, but placing the regulatory power in an independent agency, were substituted therefor. The hearings on the later bills were devoted largely to the desirability of this change and must be read in connection with the history of the earlier bills to obtain a complete legislative history of the Civil Aeronautics Act of 1938.

no room for interpretation and permits no resort to
184 the help of legislative history or other aids to construction. But to whatever extent it may be necessary to establish ambiguity before properly resorting to legislative history,[7] such ambiguity is clearly present in section 406. The language of the first provision is similar to that usually used in granting public utility rate-making powers which are traditionally applicable only to the future and is almost identical to and is copied from the language of earlier mail pay acts [8] which were never given the retroactive construction contended for by the respondents herein.

The respondents' position that because of the language of the second provision, the section must be interpreted as vesting in the Board authority to reimburse every carrier in the industry to the extent to which any such carrier may in the past have realized less than a fair rate of return is so substantial a departure from any prior regulatory plan in any related field that it clearly raises the question whether the section was not intended to have a somewhat narrower meaning. Inquiry into the field of public utility regulation, into Interstate Commerce Commission decisions under closely related statutory enactments, and into legislative history [9] discloses that the Act was never in-
185 tended to vest in the Board the retroactive rate-making power urged by respondents.

Reference to the Civil Aeronautics Act of 1938 and to the legislative history which preceded its enact-

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7 "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words . . . The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." United States v. Dickerson, 310 U. S. 554, 562 (1940).

8 See Footnote 15, infra.

9 ". . . there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination." Harrison v. Northern Trust Co., et al., 317 U. S. 476, 479 (1943). Accord: Church of the Holy Trinity v. United States, 143 U. S. 457 (1892); Texas and Pacific Railway Co. v. Interstate Commerce Commission, 162 U. S. 197, 218 (1896); Bazley v. Commissioner of Internal Revenue, 67 S. Ct. 1489 (1947).

ment discloses that the application of public utility regulatory principles to the air line industry was the principal objective of the Congress.[10] Provision in the Act for certificates of public convenience and necessity; regulatory control over rates, fares, charges, and practices in the carriage of passengers and property as well as mail; restrictions on agreements, mergers, interlocking relationships, and acquisitions of control; requirements with respect to tariffs and numerous other traditional utility regulatory provisions demonstrate that fundamentally this Act was intended to apply public utility regulatory principles to the air line industry.

It is firmly established law that a public utility rate deals only with the future. It is not concerned with the reimbursement of past losses nor with the recapture of past profits which have proved excessive. It offers only an opportunity to earn a fair return, and it does not guarantee that such a return will, in fact, be earned. The first sentence of section 406 simply empowers and directs the Board to fix rates. In no other public utility statute has such language been construed to contemplate a retroactive rate-making authority.

In the leading case of *Galveston Electric Company* v. *City of Galveston, et al.*,[11] Justice Brandeis held that a commission is not required to capitalize past losses in the rate base to be used in fixing a future rate. In the *Geor-*
186 *gia Railway* case,[12] the utility, alleging a failure to earn a reasonable return for the past four years under commission-fixed rates, asked that such deficiency be reimbursed currently in the new rates or be capitalized. In rejecting the contention, the Federal Court said:

[10] "The bill before you is more or less the usual form of American regulation of utilities or transportation and embraces the points which are common to all such types of legislation." Gorrell, *Hearings before the House Interstate and Foreign Commerce Committee on H. R. 9738*, 75th Cong., 3rd Sess., p. 297. The legislative history is discussed hereinafter in this opinion.

[11] 258 U. S. 388 (1922).

[12] Georgia Railway and Power Company et al. v. Railroad Commission, 278 Fed. 242, 247 (N. D. Ga. 1922), affirmed 262 U. S. 625 (1923).

"A rate established as reasonable, whether by the company or by the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business. We do not deny that it is within the discretion of the commission to consider the experience of the immediate past in fixing a just rate for the future, but we hold that no legal right exists to have disappointments or surprises in results balanced."

The doctrine was reaffirmed as recently as the *Natural Gas Pipeline* case[13] where, in denying the utility's claim to capitalize costs of maintaining excess capacity during the early period of operation, Chief Justice Stone said:

". . . . But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base. . . . The deficiency may not be thus added to the rate base, for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business."[14]

Comparable and related statutory enactments and decisions thereunder in the fields of railway and air carrier mail pay lend additional support to the conclusion
187 we have reached. None of these acts[15] has been held

[13] Federal Power Commission, et al. v. Natural Gas Pipeline Co., et al. 315 U. S. 575, 590 (1942).

[14] Conversely it is well established that a regulated utility cannot be required to give up excess earnings from past operations. Board of Utility Commissioners, et al. v. New York Telephone Company, 271 U. S. 23, 31, 32 (1926), Newton v. Consolidated Gas Company of New Jersey, 258 U. S. 165 (1922).

[15] July 28, 1916, c. 261, 39 Stat. 412 (Railway Mail Pay Act of 1916) which provides at page 429 (Sec. 5), that:

"The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so

to confer a retroactive mail rate-fixing authority.' In none of the 18 mail rate cases under the Railway Mail Pay Act or the 26 mail rate cases under the Air Mail Act of 1935, decided by the Interstate Commerce Commission prior to the passage of the Civil Aeronautics Act of 1938 did the Commission refix a rate for a period prior to the initiation of the proceeding.[16] The degree to which the Interstate Commerce Commission felt bound by this limitation is best illustrated in the *Railway Mail Pay case*, 144 I.C.C. 676 (1928).[17] In that case a group of carriers filed petitions for reexamination of mail rates. After preliminary investigation, the Commission broadened the proceeding to include the rates of a much larger group of railroads. After investigation and hear-

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made and published shall continue in force until changed by the commission after due notice and hearing.''

June 12, 1934, c. 466, 48 Stat. 933 (Air Mail Act of 1934) which provides at page 935 (Sec. 6a) that:

''The Interstate Commerce Commission is hereby empowered and directed, after due notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation for the transportation of air mail by airplane and the service connected therewith over each air mail route, but not in excess of the rates provided for in this Act, prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing.''

August 14, 1935, c. 530, 49 Stat. 614 (Air Mail Act of 1935) which provides at page 616 (Sec. 5):

''Subsection (a) of section 6 of such Act is amended to read as follows:

''(Sec. 6(a). The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation within the limitations of this Act for the transportation of air mail by airplane and the service connected therewith over each air-mail route, and over each section thereof covered by a separate contract, prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, and so much of subsection (g) of section 3 of this Act as is in conflict with this section is hereby repealed.''

[16] Under specific provisions of the 1935 Act which became law on August 14, 1935 (Sec. 8, 49 Stat. 614), the first rates fixed thereunder could be retroactively fixed as of March 1, 1935, but this type of retroactivity under specific statutory authority is not here involved.

[17] See also Railway Mail Pay, 165 I. C. C. 774 (1930).

ing, the Commission found the rates not fair and reasonable and ordered a review. But, although it found the rates to be inappropriate for all the carriers during the period under review, it made the higher rates effective from the date of the petition only for those carriers which had petitioned. For the other carriers, the adjustment was made only from the date the proceeding was broadened to include them. Such a holding is consistent only with the conclusion that the Railway Mail Pay Act of 1916 did not authorize a rate to be fixed prior to the date on which a rate proceeding was initiated for a carrier. The Act directed the Commission to fix fair and reasonable rates, and it found the rates for the non-petitioning carriers to be not fair and reasonable prior to the date on which they were included in the proceeding. Under these circumstances, it would have been highly arbitrary for the Commission, had it been empowered to fix rates for the period involved, to have refused to make such rates effective during this period for which it had found previously fixed rates to be not fair and reasonable.

189 In view of the similarity between the first provision of section 406 and the language of these earlier acts, the consistent constructions of those acts by the Interstate Commerce Commission is highly significant in interpreting section 406 and raises a strong presumption against the existence of any such retroactive power as is claimed by the respondents herein.[18] Supporting this interpretation is the fact that there is not one word in all

[18] *United States Steam Navigation Co.* v. *Cunard Steamship Co., Ltd., et al.*, 284 U. S. 474, 480, 481 (1932). A point has been made by the carriers in argument that the Railway Mail Pay Act of 1916 and the Air Mail Acts of 1934 and 1935 contain the following language not found in section 406: ". . . Orders so made and published shall continue in force until changed by the commission after due notice and hearing" and that, therefore, the construction of these earlier acts is not controlling in determining retroactive power under section 406. We note that a similar provision with respect to our orders is contained in section 1005(a) of the Civil Aeronautics Act of 1938. In our opinion such a provision does no more than state an obvious fact with regard to the orders of an administrative agency, namely, that except where otherwise limited they continue in effect until modified by further orders of the agency. That such a provision is not determinative with respect to the retroactive power of a rate making body was settled in the *New York Central case, infra.*

the legislative history of the Civil Aeronautics Act of 1938 to indicate an intention or understanding that the Civil Aeronautics Act contemplated a retroactive rate-making authority such as is contended for by respondents. There is no indication that the authority of the Board was to be greater, with respect to the periods for which mail rates might be fixed, than that which was exercised by the Interstate Commerce Commission under the Railway Mail Pay Act of 1916 and the prior Air Mail Acts.[19]

Furthermore, there is a clear and adequate explanation of the second provision of section 406 upon which respondents rely. It was added in order to effect a specific purpose, and that purpose was not to enable the Board to fix retroactive rates, or to exercise any authority with respect to the periods for which rates could be fixed which had not been theretofore exercised by the Interstate Commerce Commission under the Railway Mail Pay and Air Mail Acts already referred to.

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Prior to the decision of the Supreme Court in the *New York Central* case[20] there existed considerable doubt as to whether the Interstate Commerce Commission, under the Railway Mail Pay Act, could make its mail rate orders effective prior to the date of the final order and back to the date of the initiation of a mail rate proceeding. This doubt arose out of the fact that the provision conferring mail rate-making authority upon the Interstate Commerce Commission was in traditional public utility rate-making language which had theretofore been construed generally to authorize the fixing of rates prospectively from the date

[19] The report of the Aviation Commission, set up under Section 20 of the Air Mail Act of 1934, which was largely responsible for the consideration of the legislation which eventuated in the Civil Aeronautics Act of 1938, recommended that the mail rate should be adjusted by a proposed commission "exactly as the rates for carrying mail by rail are prescribed by the Interstate Commerce Commission." *Report of Federal Aviation Commission*, 74th Cong., 1st Sess., Senate Doc. No. 15, January 30, 1935, p. 64.

[20] United States v. New York Central Railroad Company, 279 U. S. 73, 75 (1929). The court here said: "We assume that while the railroads perform the service and accept pay without protest they get no ground for subsequent complaint. * * * But the filing of an application expresses a present dissatisfaction and a demand for more. * * * If the claim of the railroads is just they should be paid from the moment the application is filed."

of a utility commission's final decision. In the *New York Central* case, the Supreme Court found that the Congress had intended that the Interstate Commerce Commission could fix mail rates effective prior to the date of final decision and back to the date of initiation of proceedings. In reaching this decision, the Supreme Court found that Congress had utilized the power of eminent domain in requiring all railroads to carry mail under the Railway Mail Pay Act of 1916. The Court found that the carriers were constitutionally entitled to fair and reasonable compensation from the date on which they had instituted a proceeding; that unless the Commission had authority to make its rate orders effective back to that date no provision would be made for certain constitutional rights of the carriers.

191 It will be noted that considerable similarity characterizes the language in Section 5 of the Railway Mail Pay Act of 1916 and Section 6a and 5 of the Airmail Act of 1934 and the Airmail Act of 1935, respectively. One might have assumed, therefore, that the principles applied in the *New York Central* case would be made applicable to the interpretation of the Airmail Acts of 1934 and 1935. Differences, however, exist to some degree as to the extent to which air carriers, as distinguished from the railroads, could be obliged under these Acts to carry the mail. These differences led to a divergence of views among the members of the Interstate Commerce Commission on the question as to whether the Airmail Act gave them authority similar to that contained in the Railway Mail Pay Acts to fix rates that could be made retroactive to the date of filing a petition.

In *Air Mail Compensation* decided June 6, 1936, by Division 3,[2] it was held, in substantial reliance upon the *New York Central* case, that the Commission had authority to make its mail rate orders effective prior to the decision date and back to the date of commencement of proceedings. Chairman Mahaffie dissented, in part on the ground that

[2] 216 I. C. C. 166 (1936).

the *New York Central* case was based on eminent domain and constitutional requirements and was no sound authority under the Air Mail Act of 1934. On appeal to the full Commission, the decision of Division 3 was sustained.[22] Commissioners Lee and Mahaffie dissented, and Commissioners Splawn and Caskie concurred in a separate opinion, but they pointed out in their opinion that the *New York Central* case was not necessarily a governing precedent for the Commission's action.

192 Commissioner Mahaffie continued to dissent on this point in six separate proceedings, the last of which was issued after enactment of the Civil Aeronautics Act of 1938. Thus, during the entire period during which the Civil Aeronautics Act of 1938 was under consideration by Congress, a difference in views over the meaning of certain language in the Air Mail Acts continued. Since substantially identical language was being considered for inclusion in what later became section 406 of the Civil Aeronautics Act, clarification of Congressional intent was advisable. To accomplish this purpose, the last clause of section 406(a)(1) was added.[23]

Colonel Gorrell[24] explained the *New York Central* case to House and Senate Committes[25] and concluded:

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[22] Air Mail Compensation, 222 I. C. C. 602 (1937).

[23] ". . . and to make such rates effective from such date as it shall determine to be proper."

[24] Colonel Gorrell, at that time President of the Air Transport Association, was one of the principal witnesses at the hearings in both Houses of Congress.

[25] The carriers have contended that we can give no consideration to the testimony of witnesses at the hearings before Congressional Committees considering the bills which ultimately resulted in the Civil Aeronautics Act of 1938. On this point we find that the use of committee hearings as aids in legislative construction has long been accepted as proper. In the last term of the Supreme Court such use was made of legislative hearings in at least seven cases: United States v. Ogilvie Hardware Company, Inc., 67 S. Ct. 997 (1947); Rice, et al. v. Santa Fe Elevator Corporation, et al., 67 S. Ct. 1146 (1947); United Brotherhood of Carpenters and Joiners of America v. United States, 67 S. Ct. 775 (1947); United States v. Hoy, 67 S. Ct. 1004 (1947); Levinson v. Spector Motor Service, 67 S. Ct. 931 (1947); United States, et al. v. Seatrain Lines, Inc., 67 S. Ct. 435 (1947); American Stevedores, Inc. v. Parello, et al., 67 S. Ct. 847 (1947).

Earlier acceptance of the same principle is found in: Church of the Holy Trinity v. United States, supra; United States v. McGowan, et al., 302 U. S. 535 (1938); Brooklyn Bank v. O'Neil, 324 U. S. 697, 709 (1945); Oregon-Washington Railroad & Navigation Company v. McGinn, 258 U. S. 409 (1922); United States v. Rehwald, et al., 44 F. (2d) 663 (S. D. Calif. 1930).

". . . . there is no substantial doubt but that the Commission is empowered to put a rate order in effect as of the date when the Commission has been formally advised an unjust rate then and there existed." [26]

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He later suggested the new language of section 406, i.e., ". . . . and to make such rates effective from such date as it shall determine to be proper," [27] and stated that by this change "the present authority of the [Interstate Commerce] Commission to fix appropriately the effective date of its rate decisions is likewise specifically preserved." [28]

There does not appear any other comment on or information concerning this language in the entire legislative history of the Act or its predecessor bills. It is clear that the "effective date" amendment was offered for purposes of clarification, not for the purpose of granting a power

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which did not already exist. Colonel Gorrell merely sought to preserve the existing authority of the Commission which, as founded on the *New York Central* case, and as later followed in the early air mail decisions, was limited to the fixing of mail rates that could be made effective as of the date proceedings were initiated.

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[26] Id. pp. 483-5. For similar testimony before the House, see *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess., pp. 325-7.

[27] Hearings before subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st Sess., p. 523.

[28] Id. p. 525. After discussing the retroactive rate decisions of the Interstate Commerce Commission before the House Committee, Colonel Gorrell proposed the same amendments and made exactly the same comment. *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess., p. 408. When H. R. 9738 and S. 3659 were substituted for H. R. 5234 and S. 2 (see footnote 6) the rate-making provisions therein embodied Colonel Gorrell's amendment. In testifying upon these bills, Colonel Gorrell, at the suggestion of the Committee Chairman (at both the House and Senate hearings), did not testify as to those details which he had covered in his testimony on the original bills. He stated: "Last year in testifying, as your chairman has said, we discussed at length the need for legislation. With your permission, we will not cover any of the details which we covered last year." (Emphasis supplied.) *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9738*, 75th Cong., 3rd Sess., pp. 296-7. *Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3rd Sess., p. 21.

In spite of this clear indication that no retroactive rate-making authority was in fact intended by the statutory provision relied on by respondents, it is asserted that the Civil Aeronautics Act of 1938 contains subsidy and developmental provisions not contained in other acts, and it is urged that the proper administration of those aspects of the Act requires that the Board be empowered to make carriers whole for deficiencies in revenues incurred during periods prior to institution of any rate proceeding and while a rate previously fixed by the Board was in effect.

At the outset it may be pointed out that insofar as the Civil Aeronautics Act may be said to authorize "subsidy," the Air Mail Act of 1934, originally, and as amended by the Air Mail Act of 1935, would appear to have authorized it in much the same fashion.[29] Under these Acts, airplane

[29] Contract rates mentioned in those Acts were in terms of rates per airplane mile and the limitations on maximum payments that could be made were expressed in the same terms. The Interstate Commerce Commission in fixing rates used a base rate per airplane mile for a base poundage of 300 pounds. This base rate was payable on mail loads, no matter how small. Above that poundage additional amounts became payable. Since loads rarely attained the base poundage, the amount paid for the carriage of mail bore no direct relationship to the amount of mail carried.

The basic nature of the Acts is, however, most clearly apparent from the rate-making principles enunciated by the Interstate Commerce Commission in its first case (under the 1934 Act) Air Mail Compensation, 206 I. C. C. 675. At page 717 the Commission stated:

"Passenger service is required by the Government, and that requirement compels the acquisition and operation of equipment superior to that which would be required if the mail were flown without passengers. Such equipment is more expensive to own and operate than aircraft which could meet the speed and other requirements for mail service alone. Even where the passenger service is rendered on exclusive passenger schedules, it does not follow that such schedules must be entirely ignored in the fixation of rates for the transportation of air mail in view of the necessity for providing passenger traffic, and not the mail service, and the use made of exclusive passenger schedules in mail service."

And further stated at page 722:

"If rates were fixed by the use of cost allocations at this time, all incentive for the maintenance and future development of passenger traffic might be destroyed, and a tendency to revert to exclusive mail service might follow. The effect of efforts to reduce the cost of mail service by increasing the returns from passenger business would be lost. It is obvious that the time has not yet arrived when the passenger business of the contractors can stand alone."

Applying the principles so expressed, the Interstate Commerce Commission, instead of fixing mail rates on the basis of the cost of the mail service arrived

mileage rates were specifically provided for, non-
195 mail schedules were to be considered in fixing rates
and the amount paid did not have to bear a relation-
196 ship to the amount of mail carried. Yet, despite
these "subsidy" features, these Acts were never considered to grant the retroactive power here claimed.

There is no reference in the Civil Aeronautics Act to subsidy as such. To whatever extent subsidy may be contemplated by the Act, it is provided through a mail rate as "a fair and reasonable rate of compensation for transportation of the mail," et cetera. Such a rate, under the Act, may provide greater revenue to the carriers than would be required to compensate solely for transporting

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at by a distribution of expenses between the various services, fixed rates so as to make up the difference between total cost (including a fair return) and total revenue on designated mail routes. This is very much the same type of subsidy that is used in the Civil Aeronautics Act of 1938.

Under those Acts, the Postmaster General designated certain schedules for the carriage of mail and it was to the mileage of these designated schedules that the mail rates applied. Because it was often convenient to carry mail on exclusive passenger schedules, the 1935 Act specifically provided that the Postmaster General might, at a carrier's request and for his convenience, authorize the carriage of mail on a non-mail schedule with the understanding that the weight of mail so transported would be credited to a regular mail schedule and no mileage compensation would be paid therefor. Such authorized but not designated trips were known as weight-credit schedules. Though section 6(c) of the 1935 Act contained a direction to the Commission to disregard losses resulting in the opinion of the Commission from the unprofitable maintenance of non-mail schedules in cases where the Commission found that the gross receipts from such schedules failed to meet the additional operating expenses occasioned thereby, the Commission in Air Mail Rates for Route No. 24, 222 I. C. C. 749, ruled that the limitation was not applicable to weight-credit schedules. This holding wiped out the limitation of section 6(c) as to the losses which the Commission might consider so far as it concerned any exclusive passenger schedule which for the convenience of the carrier had been authorized for the carriage of mail on a weight-credit basis. This meant that for all weight credit as well as designated mail schedules the total costs of the schedule might be considered in fixing the rate. Moreover, although the Commission had in its first case adopted a general rule of disregarding costs and revenues from "off line" schedules, it dropped any such distinction insofar as such off line schedules were designated for the carriage of mail or were authorized on a weight credit basis. Air Mail Rates for Route No. 2, 231 I. C. C. 229. The net result of all of these rulings was that so long as a schedule was designated or authorized to be used for mail, air mail pay was used to make up the difference between total cost and total revenue and provide a return to the operator, precisely the same type of subsidy as is found in the Civil Aeronautics Act of 1938.

Even an "on line" exclusive passenger schedule neither authorized nor designated for the carriage of mail received a degree of subsidy, since only the additional out-of-pocket costs incurred in its operation were charged against it. Air Mail Compensation for Route No. 2, supra, the general overhead being entirely carried by mail pay. See also note 42, infra.

the mail only by virtue of the fact that the Board, in determining such rate, is directed to consider the need of the carrier for revenues sufficient not only to perform the mail service but sufficient, together with all other revenues, to enable it to achieve objectives of the Act with respect to air transportation generally. To whatever extent
197 "subsidy" may be authorized by the Act, therefore, it must be included in a mail rate fixed and determined in accordance with the provisions of the Act. It is difficult to understand by what logic it can be argued that the Board can fix a retroactive rate for a past period for which it could not otherwise do so, simply because, in arriving at the amount of the rate, it is directed to consider factors not ordinarily considered by other rate-making agencies.

It is urged, however, that such retroactive authority is *essential* to carry out the purposes of the Act. With this contention we cannot agree. Far from being essential, we believe that such retroactive authority would be definitely harmful in the administration of this Act. The effect of such retroactive rate-making would be to change radically the fundamental principles upon which we believe the Act is based.

The respondents in effect urge a cost-plus subsidy plan, in place of a traditional prospective rate-making technique. Under the latter plan there is a twofold pressure to economy and efficiency caused by the necessity of living within a known rate and by the prospect of being able to retain earnings which may be effected under the rate. Administration of the mail pay provisions of the Act through the instrumentality of a prospective rate is designed to foster a sound air transport system in the interests of the traveling public, the post office, and the national defense while retaining in this industry competitive characteristics which, under our economy, are deemed desirable and productive of public benefit.

Consistent with the principles of the Act, in fixing a rate for the future we allow a rate designed to pay the carrier

a reasonable return upon its investment for assuming the risks incidental to operation. Initially, if the carrier believes the rate fixed by us to be unreasonable, it has the opportunity to seek review of our action. Even though the rate be deemed initially reasonable, events may, of course, take an unhappy turn and this may result in low earnings or even in losses despite the efficiency of the carrier's management. But in that event, the carrier has the opportunity to petition us for a new rate based upon new circumstances and new facts. This theory of rate administration is designed to promote competency in management through the incentive of profit. At the same time, as a counter-balance, losses incurred under a reasonable rate acceptable to the carrier must be absorbed.

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Contrariwise the suggestion of the parties to this case is that we assume the responsibility of making up losses incurred over a period of time during which management either did not believe the rate to be an unreasonable one or, if it held such a position, did not see fit to inform us of that fact. On its face the suggestion asks us substantially to put all so-called efficient managements on a cost-plus basis. This would obviously be a reversal of past policies of rate fixing for it would have a natural corollary—the corollary that was freely admitted in this case—that earnings of air carriers in excess of a fair and reasonable rate would be subject to recapture. Such a policy would tend to sap management of those very incentives that in a private economy are essential if we would strive for efficiency.

To avoid the cost-plus operation of the doctrine now advanced, TWA suggests that our power to fix retroactive rates is a discretionary one and should only be exercised under "unusual circumstances," but such a limitation when examined is either illusory or impossible of application. Any circumstances that had a depressive effect on earnings and that were beyond the control of management would seem to come within the classification of "unusual." The result would thus be that the standard

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in fact would become one of placing efficient management on a cost-plus basis. The other alternative would give us a discretion both to give and take that would be arbitrary and provocative of endless litigation, both before us and the courts.[30]

There are further difficulties with the suggested construction of the statute. The discretion of the Board could be appealed to at any time, possibly limited by the doctrine of laches, to make up for past losses. Similarly, the Board could at any time exercise its discretion to recoup past gains. Financial statements of air carriers would thus never become firm. Similarly, the Post Office's accounts would be subjected to the same uncertainties, and similar infirmities would surround the preparation of budgets for the airmail postal service. Chaos and confusion stretching back to 1938 would be the result.

In support of their contention as to unusual circumstances, respondents rely chiefly on the Western case,[31] but on careful analysis of the facts in that case we can find no support therein for respondents' position. In that case the carrier had a mail rate applicable to two old routes. It started service on a new route and six months later petitioned for a system rate. In determining what additional compensation was required because of the operations on the new route, we reviewed the operations of the entire system from the date of inauguration of the new route and found that no increase in the mail compensation already payable was required because of the new route. Obviously when a new operation is commenced the question of mail compensation for that operation from

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[30] To interpret the statutory language "make such rates effective from such date as it shall determine to be proper" as granting the broad discretion here urged raised formidable administrative and constitutional difficulties. There is another construction which avoids these difficulties and yet gives meaning to the language, that is, that it empowers and directs us to make an order effective from the date we determine to be *legally* proper. So in the case of a new route for which no mail rate was previously in effect, we are given authority to make the rate effective from the date operations commenced thereon, as is constitutionally necessary, even though mail rate proceedings are not initiated until later. See note 32, infra.

[31] Western Air Lines, Mail Rates, 4 C. A. B. 441 (1943).

its commencement must be decided.[32] In determining the compensation to which Western might be entitled for the new route for this retroactive period, we said:

". . . . that in considering and determining the rate of mail compensation to respondent for mail services heretofore performed on Route No. 52, the need of the carrier should be considered and determined upon a system basis. . . . ."

Proceeding on that basis we found that Western was entitled to no additional compensation for having operated Route 52 from the date of the inauguration of service in June 1941 to December 31, 1941. In the opinion we said in part:

"In the absence of *like unusual circumstances* the Board will adhere to its policy not to review rates prior to the institution of a proceeding . . . ." (Emphasis supplied.)

It is in reliance on the language last quoted that the contention is made that the case establishes the principle that we can ignore the date of institution of a proceeding where there are unusual circumstances. TWA then argues that the grounding of the Constellations and the pilots' strike constitute such unusual circumstances as would bring it

[32] In recognition of that principle we have in a number of cases determined rates for certain routes from the date operations commenced thereon, even though this antedated the initiation of proceedings, but these cases do not recognize any general power to determine rates for periods prior to the initiation of proceedings. These cases involved no question of the retroactive revision of a final rate, since no rate at all was in effect for the new routes. All American Aviation, Mail Rate for Route No. 49, 3 C. A. B. 79 (1941); United A. L., Mail Rate for Route No. 57, 3 C. A. B. 381 (1942); Pan American Airways, Inc., Alaska Mail Rates, 6 C. A. B. 61 (1944); Caribbean-Atlantic Air, Mail Rates, 6 C. A. B. 407 (1945). There is language in the opinion in American A. L., Mail Rates, 3 C. A. B. 323, 331 (1942), which might support the argument that we have full discretion in determining the extent to which our rate orders may be made retroactive, but any inference which may be drawn therefrom must be limited by the fact that the case involved only the power to reduce rates for the retroactive period prior to the date of the rate order but *after* the date of initiation of the proceeding.

within the exception.[33] But such construction obliterates the word "like" in the quotation and disregards the facts in the *Western* case. These facts make it clear that
204 the *Western* case is no more than another application of the requirement that where there is no rate in effect for a route we must consider mail pay requirements arising as a result of the new operation from the date mail service begins thereon, irrespective of the date on which mail rate proceedings are initiated.[33]

As we have indicated above, the fact that subsidy may be included in a rate which we may fix, as is urged by petitioners, has no proper place in an argument concerning the periods for which we are empowered to fix such a rate. We are convinced, moreover, that sound administration of the Act in its developmental aspects not only requires no retroactive authority but can best be achieved without it. This conclusion is consistent with our administration of the Act since 1938.

Although this Board has consistently recognized the developmental responsibilities placed upon it by the Civil Aeronautics Act of 1938, its administration of the mail pay provisions of the Act has uniformly recognized that the basic principles of public utility rate-making apply
202 to the fixing of mail rates. In the *Chicago and Southern* case[34] we denied the carrier's request that a reduction in rates be deferred until it had an opportunity to accumulate net earnings sufficient to yield a fair return on its investment from the beginning of operations. We there stated:

"The mail rate provisions of the Civil Aeronautics Act do not call for what would be in effect a revision of his-

[33] The obvious impracticability of the suggestion that we might exercise a retroactive rate-making discretion on the basis of "unusual circumstances" is clearly shown in the TWA case. Neither the grounding of planes, especially when new equipment is being used, nor labor difficulties are particularly unusual, and both are to be expected from time to time. The "unusual" characteristic of the grounding of the Constellations and of the TWA strike is the amount of the losses resulting therefrom. We could certainly not turn the exercise of a discretionary authority to make a carrier whole for past losses on the amount of such losses.

[34] Chicago and Southern Air Lines, Mail Rates, 1 C. A. B. 419 (1943).

torical earnings so as to reimburse the carrier for inadequate profits received in the past; these provisions require the establishment of present and future rates which will enable the carrier under honest, economical, and efficient management to discharge its public service obligations as specified by the Act. The statutory policy is not remedial of past inadequacies; it is instrumental of present and future accomplishment."[35]

In all our rate decisions we have assumed that risk of loss, should rates prove inadequate, would fall upon the carrier, and we have allowed a rate of return commensurate with the risks that appeared to be involved. The most striking illustration of this is to be found in the *Big Four* cases wherein TWA's present 45-cent rate was fixed. Although the rate proposed in the show cause order was 32 cents, we increased it to 45 cents to compensate for the higher risks we foresaw in the transitional post-war period.

The concept of providing payment for risk in the rate of return to which we have consistently adhered is diametrically opposed to the principle of reimbursement for past losses. In urging such reimbursement, the respondents completely misconceive the function of a rate. A rate represents full compensation for the services rendered or to be rendered during the period for which the rate is effective. This includes full compensation for riskbearing. This payment for riskbearing is high when the risks appear to be great and low when the risks appear to be small, but it is a payment for the function of bearing the risk and is not intended as a reimbursement for every loss which may in fact occur.[36]

203 That the mail rate provisions of the Act were intended to be administered in accordance with the principles just discussed is indicated by the legislative his-

[35] Ibid. p. 420.

[36] The different rates of return in Pan American Grace Airways, Inc., Mail Rates, 3 C. A. B. 550 (1942) and in Pan American Airways, Inc., Transatlantic Mail Rates, Order Serial No. E-612, decided June 9, 1947, exemplify the manner in which the rate of return reflects the risks involved.

tory of the Act. Prior acts had been relatively temporary measures.[37] The Civil Aeronautics Act was intended as permanent long-range legislation. Its all-important objective was to afford the air transport industry relief and protection in the nature of that afforded public utilities.[38] What was desired was protection against uncontrolled competition by non-mail operators, and against cut-throat competition in freight and passenger fares by other mail operators.[39] What was sought was sufficient stability under public utility type regulation to make it possible for the industry to attract the private capital necessary for its development.[40] It was clearly recognized that a "rate structure" founded on traditional rate-making principles was necessary as one adjunct of the protection inherent in common carrier and utility regulation.[41]

204 Although there was some discussion of direct subsidy, the proposal was clearly rejected in favor of the plan whereby the needs of commerce and the national defense were merely additional elements to be considered

[37] "*The Air Mail Act of 1934 was designed as a temporary measure.* Many of its provisions are ambiguous; others definitely contradictory; and still others are not susceptible of rational understanding." Senator McCarran, 83 Cong. Rec. 6634 (May 11, 1938). (Emphasis supplied.) "Indeed, *the 1934 Act itself recognized its temporary nature* by providing for the appointment of a Federal Aviation Commission to recommend 'a broad policy covering all phases of aviation and the relation of the United States thereto.'" (Emphasis supplied.) Gorrell, *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st sess., p. 64.

[38] The extended discussion of certificates of public convenience and necessity, regulation of passenger fares to prevent cut-throat competition protection of routes, safety and labor regulations, control of accounts, mergers, interlocking relationships, etc., clearly indicate that it was desired to replace the emergency measures of the Air Mail Act of 1934 and the 1935 amendment with legislation involving permanent public utility regulation of airlines. Note 27, supra, pp. 51-64, 70, 310, 377, 467. Note 28, supra, pp. 27, 30, 39, 40, 46-8, 66, 68-9, 74, 76, 163, 164, 167-264, and 280.

[39] Note 28, supra, pp. 69, 74, 81-2, 164.

[40] *Hearings before subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d sess., pp. 21, 30.

[41] Note 27, supra, pp. 438, 496-7.

in fixing a "fair and reasonable rate." [42] There is no indication whatever of any intention to change the traditional rate-making procedure of the 1935 Act.[43] The principal substantive changes apparently sought in the mail rate provisions of the Act were a removal of the provisions for disregard of non-mail losses and those provisions fixing maximum limits to mail rates and relating total mail pay to total postal revenues from air mail.[44]

There is not one indication in all the legislative history or in the Act itself that a guarantee of carriers against losses under rates found fair and reasonable by tra-
205 ditional public utility rate-making procedures were intended or thought necessary to accomplish the developmental purposes of the Act. There is no doubt that the Congress could have provided a statute which embodied such a guarantee, but it is clear that it did not, and did not intend to do so.

Our conclusion makes the date of filing of a rate petition in many cases of great importance. But this is not a mere

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[42] "Moreover, the bill does not provide a subsidy in the sense mail subsidies were provided under the old system of ocean mail contracts. Those contracts set up an arbitrary dole to be paid to the shipping companies solely on the basis of mileage sailed, even though virtually no mail was carried. . . . This dole increased year by year and bore no necessary relation to the mail service. The present bill makes no such provision . . . Instead, it leaves the way open so that the Commission can apply the most suitable method as the facts warrant, with an effort to adjust the amount of pay to the service rendered from time to time as the public interest may dictate." Gorrell, note 28, supra, at p. 316, and note 27, supra, at p. 468.

Mr. Haley, Director of the Bureau of Air Mail, Interstate Commerce Commission, distinguished the "direct subsidy" doctrine as follows: "But the commission does not do that [add to an existing mail rate operating losses]. *If that were the legislative policy of the Congress perhaps it should be expressed in an act similar to the Maritime Act, where the subsidies are specifically provided. It is not in this act.* [Emphasis supplied.] There is no reference to subsidy in this Air Mail Act." Note 27, supra, at p. 251. See also Note 28, supra, pp. 36, 79, 151, 243, 244, 308, and Note 27, supra, pp. 75, 76, 121, 169, 337-8, 339, 465.

[43] "The bill now before you provides what seems to us the appropriate method of determining compensation. It is a method quite similar to that adopted in the case of transportation of mail by the railroads, and since the Commission is to fix other rates, which themselves will have some effect upon the cost of transportation of mail, it would seem that the same commission should determine reasonable pay for mail carriage." Gorrell, Note 28, supra, p. 307. "The provision is very largely copied from the Railway Mail Pay Act. I refer you to 39 U. S. C. A. section 542." Gorrell, Note 27, supra, p. 446.

[44] Note 28, supra, pp. 233, 308, 309.

insistence on certain procedural requirements for their own sake. Instead, the filing of a petition when rates have already been fixed is a matter of substance, for until a petition is filed by the carrier we have no notice that an existing rate is regarded as unsatisfactory, and we thus have no opportunity to take whatever action we might feel it incumbent in that event for us to take. Until a petition is filed presumably the rate is regarded as reasonably remunerative by the carrier. We should be allowed as a matter of effective administration to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief whether in the form of revision of rates or otherwise. The carrier should be enabled to rest upon a similar assumption until some action by us is initiated. Any other approach would mean that those important relationships between the carrier and the government which center about rates and which at the time are deemed satisfactory by both parties and upon which both parties have acted and planned could later be re-examined and reshaped. This would im-
206 peril stability both from the standpoint of the government and of the carrier, for it is idle to talk of rates being fixed if, at any time thereafter they could be retroactively revised.

It has been suggested that it will be the effect of this decision to cause all carriers to keep a "protective" petition on file with the Board at all times in order to prevent unpredictable losses. We do not anticipate this development. From management's viewpoint the situation will not be materially different from that which has existed heretofore. The carriers have long been aware of our unbroken policy not to fix retroactive rates. Furthermore, the Board has exactly the same authority with respect to the date from which it can make its mail rate orders effective, whether a new rate be higher or lower than one previously in effect. Unless a carrier believes that it will realize less than a fair and reasonable return from the date on which it files,

there would be little point in filing. Should it file and thereafter earn more than a fair and reasonable return, our rate order, effective from date of filing, would effect a reduction in mail pay from that date forward.[45]

207 In addition to the points already discussed, several other contentions made by respondents require some comment. PCA contends that it has a constitutional right to be made whole for past losses and that the statute must be construed to permit this in order to sustain its constitutionality. We can find no merit in this contention. In applying for a certificate to carry mail, a carrier must be presumed to have relied on the provisions of the statute which define the compensation to be paid for that service. Under the statutory provisions, such compensation is to be a "fair and reasonable rate" and the carrier is entitled to no more than is comprised within that term. But a rate is constitutionally adequate if it affords a carrier an opportunity to earn a fair return. There is no constitutional requirement that the carrier in fact earn such a return or that it be given an opportunity to recoup past losses incurred under rates which experience has proved inadequate.

Finally, both respondents make the contention that irrespective of our general policy to fix retroactive rates prior to the date of initiation of a rate proceeding, we are required to do so where a new route is established for which there was no mail rate in effect. In those cases, it is contended, we are required to review the rates of the entire system from the time service was inaugurated on the new route, irrespective of whether a proceeding has been initiated either for the new route or for the system. PCA asserts that service on its Routes 34, 41, and 51 was suspended at the time the 60 cents per ton-mile rate was fixed, and that

[45] It should be noted that the decision in the *Panagra* case (Pan American Grace Airways, Mail Rates, 3 C. A. B. 550 (1942)) where we refused to recapture excess earnings for the period between initiation of proceedings and issuance of the rate order, does not constitute an immutable holding that we will in no case make a downward readjustment retroactive for such a period. The holding in that case was made in the light of the conditions then existing and may, of course, be reconsidered as conditions dictate.

it is entitled to a review of its system rates at least from the date it resumed service on these routes. TWA points out that it commenced operations on its international routes on February 1, 1946, and asks for a review of its system rates at least back to that date.

208 The contentions of respondents appear to rest on a misconception of the *Western* case. As we have mentioned previously, that case was no more than an application of the principle that where there is no rate in effect for a new route we must consider mail pay requirements arising as a result of the new operation from the date mail service begins thereon, irrespective of the date mail rate proceedings are initiated. The decision does not require us to make a carrier whole for past losses on its system simply because a new route was placed in operation prior to petition date.[46]

In fixing mail rates it is our general policy to do so on a system basis. Consistently therewith, in determining the mail pay requirements for a new operation, we review overall operating results and determine total mail pay requirements. If the total mail compensation is adequate, we need not allow any additional compensation for the new service whether or not the operation of such service may antedate the commencement of proceedings. If total mail compensation was inadequate for the entire past operation,

209 including the new operation, we would determine the extent to which such inadequacy was attributable to the new operation, and we would provide the additional

[46] In the pending *Northeast* case, Dockets Nos. 1932 and 1890, some four weeks after the filing of the carrier's petition for a rate on a new route, a Board order was issued proposing a system rate effective back to the date of inauguration of service on the new route. During the 7-week period a previously fixed rate was in effect for the balance of the system. A show cause order later was issued proposing a system rate effective from commencement of new route operations, and this rate was later put into effect as a temporary rate. In the pending *Colonial* rate case, Docket No. 2724, the carrier filed a petition for a system rate some eight months after commencing operations on a new route. During the 8 month period a previously fixed rate was in effect for the balance of the system. A temporary system rate was set by the Board effective from commencement of operations on the carrier's new route. The proper treatment of the questions raised in these cases will be decided when final rates are fixed therein.

mail pay needed to compensate for the new service. In the absence of a proceeding putting in issue the rates on the balance of the system, we do not believe that we should readjust rates to make up for mail pay inadequacies incident to operations other than the new service.

The principle of the *Western* case could in no event apply to PCA's situation. The *Western* case applied to a situation where operation was begun on a new route for which a rate had never been previously fixed. In the case of PCA, the December 16, 1942 order specifically fixed rates for the suspended routes. TWA is likewise excluded from any possible application of the *Western* case by the express terms of the order which fixed the 45-cent rate for its domestic system. In that order we specifically provided that the rate was not to apply to the international operation, for which we subsequently, in a separate proceeding, fixed a temporary rate. This has the effect of a determination that TWA's domestic and international operations are separate units for rate-making purposes. Under these circumstances there is no basis for the application of the *Western* case.

In view of the foregoing, we hold that we have no power to fix a new rate for an operation to apply to a period during which a final rate for that operation was in effect and not challenged by the initiation of a proceeding looking towards its revision. We, therefore, are of the opinion, that Public Counsel's motions in these proceedings must be granted and that respondents' petitions insofar as they request the fixing of mail rates effective prior to the date upon which respondents filed their mail rate petitions must be dismissed.

Accordingly, Public Counsel's motions to dismiss respondents' mail rate petitions in so far as they request the fixing of mail rates to be effective prior to the filing dates of those petitions are granted and said petitions are to that extent dismissed.

Appropriate orders will be entered.

Landis, Chairman, Ryan and Branch, Members of the Board, concurred in the above opinion. Lee, Member, filed the attached dissenting opinion.

211. Orders
Serial Number E-1033

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 2nd day of December, 1947.

Docket No. 2849

In the matter of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith of.

TRANSCONTINENTAL & WESTERN AIR, INC.,

over Routes Nos. 2, 38, 44 and 58.

Order Dismissing Petition in Part

Public Counsel having moved to dismiss the carrier's petition in the above entitled proceeding insofar as it requests the fixing of a mail rate for a period prior to March 14, 1947, the filing date of the petition; oral argument having been held thereon; and the Board upon consideration thereof having issued its opinion containing its conclusions and decision, which is attached hereto and made a part hereof;

IT IS ORDERED, That the petition of Transcontinental & Western Air, Inc. filed March 14, 1947, insofar as it requests the fixing of a mail rate for a period prior to March 14, 1947, be and it hereby is dismissed.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN,
Secretary.

(Seal)

212 **Lee, Member, Dissenting:**

I disagree with the majority's finding that the Board has no power to set a retroactive rate. Such a finding is contrary to the long-established policy of the Board, and is inconsistent with the express provisions of the Civil Aeronautics Act. The Act contains plain and unambiguous language as to the Board's power to establish rates retroactively, and the majority has gone to considerable length to read into the Act language which is not there and to place upon the Act a strained interpretation which is contrary to previous Board decisions and which Congress never intended.

Section 406(a) of the Act provides that the Board "is empowered and directed . . . to fix and determine . . . the fair and reasonable rates of compensation for the transportation of mail . . . *and to make such rates effective from such date as it shall determine to be proper.*" There is nothing ambiguous about this language. It states simply that the Board in its discretion may determine the date upon which its rate orders shall become effective. The interpretation of this plain language is not dependent upon legal theories; it requires nothing more than a working knowledge of the English language. The Board itself recognized and adopted a clear rule of statutory construction in the *United-Western Interchange* case[1] when it said:

"It is an established principle of statutory construction that it is not permissible to interpret the clear and unambiguous language of a statute. [citing cases] Although the title of Section 408 does not refer specifically to leases, that fact cannot be relied upon to create an otherwise absent ambiguity or to modify the meaning of the unambiguous language of subparagraph (a) (2) thereof."

213 This rule of statutory construction is equally applicable to the instant proceeding in which the majority seeks to "interpret" Section 406(a).

[1] 1 C. A. A. 723.

It is of interest to note that Section 1002(d) of the Act directs the Board in certain cases to prescribe the lawful rate for the transportation of persons and property "thereafter" to be charged. Here Congress intended to limit the Board's retroactive power, and it has done so by express and unmistakable language wherein rate orders should be prospective only. Again in Section 1002(h) the Board is given the power, upon complaint or upon its own initiative, to prescribe divisions of rates "from the date of filing the complaint or entry of order of investigation, or such other date *subsequent* thereto as the Board finds to be just, reasonable and equitable." How different are Sections 1002 (d) and (h) from Section 406. Section 406 specifically gives the Board the power to make a rate for the transportation of mail effective from such date as the Board shall determine to be proper. Sections 1002(d) and (h) expressly limit the Board's power to act retroactively. If Congress did intend to limit the Board's rate-making power for the transportation of mail surely the restrictive language contained in Sections 1002(d) and (h) would have been inserted in Section 406. In my opinion Section 406(a) contains clear and unmistakable language in authorizing the Board to make rates of mail compensation effective from whatever date the Board determines to be proper.

The Board has consistently recognized that the Act provides it with legal power to make rates effective prior to the date of the institution of the proceeding, and the Board has frequently exercised this power. In the *Western Airlines Rate* case, 4 CAB 441 (1943); the carrier filed its petition on December 3, 1941. The Board, however, reviewed Western's need for mail compensation for the period beginning June 12, 1941. In the *All American Rate* case, 3 CAB 79 (1941) the carrier filed its petition on December 9, 1940. The Board set the rate not from the date of the filing of the petition, but from August 12, 1940, the date of inauguration of service. The Board treated United Airlines in a similar manner when it fixed

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a rate for Route 57, 3 CAB 381 (1942). United's petition was filed on May 21, 1941, and the rate set was from May 12, 1941. The same was true in the *Pacific-Alaska Rate* case, 6 CAB 61 (1945), where Pan American was compensated for carrying the mail for a period prior to the date of the filing of the petition.

In the recent *Northeast Rate* case,[2] Dockets Nos. 1932 and 1890, the Board issued a show cause order accompanied by a Statement of Tentative Findings and Conclusions which fixed a system rate of 18.65 cents per airplane mile for the period May 1 to October 31, 1945, in spite of the fact that the proceeding was not instituted until May 14, 1945, when Northeast filed a petition for the determination of a fair and reasonable rate for only one of its routes.

The majority now takes the position that the rate cases referred to above cannot be used as a precedent for the Board's authority to establish a retroactive rate because these cases involve the fixing of a rate for new routes for which rates had never been set. This is not true, however, because as recent as April 1, 1946, the Board issued a show cause order to Northeast, as pointed out above, which fixed a retroactive rate for that carriers' system. This
215 rate applied retroactively to one of Northeast's routes over which the Board had already fixed a rate on July 1, 1942. While it may be argued that the Northeast show cause order was not a final opinion and only a tentative action of the Board, it is significant that in the absence of any objections by the carrier, a show cause order becomes final. Rule 13(d) of the Board's Rules of Practice provides that if no answer is filed to the Board's show cause order, a statutory public hearing will be held and "will be expected to require nothing more than the introduction in evidence of the exhibits . . ." The Board then adopts the tentative decision and such decision becomes the final decision of the Board. In the absence of specific objections by Northeast the show cause order could have be-

[2] Order Serial No. 4623, Dated April 1, 1946.

come a final Board decision. While Northeast did file objections to the Board's Statement of Tentative Findings and Conclusions, no objection was raised with respect to this particular issue wherein the Board reviewed Northeast's rates for its entire system. Since Rule 13(e) of the Rules of Practice limits the issues in a rate case, it may be presumed that this phase of the Northeast show cause order will become final.

In attempting to distinguish the Board's action in the *Western* case, wherein Western's route No. 52 was under review from June 1941 despite the fact that the rate proceeding was not instituted until December 1941, the majority refers to the following language from the Western opinion:

> "In the absence of like unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding."

216 The majority now interprets this to mean that the Board has *no power* to review rates prior to the institution of a proceeding. But there is a vast difference between *power* and *policy*. The Board did not say that it had no power, but merely stated that it would *adhere to its policy* not to review rates prior to the institution of a proceeding, indicating that this is solely a matter of discretion. If the Board had meant to conclude that it had no power to fix a rate prior to the institution of a proceeding, it would have been a simple matter to write such a conclusion into the opinion.

No opinion has ever been issued by the Board which stated that the Board's power to issue a retroactive rate is in any way limited. As pointed out above, however, there are numerous decisions in which the Board actually exercised its power to set a retroactive rate. As recent as August 27, 1947, the Board exercised this power when its rate order became effective in the *Pan American rate* case, Docket No. 1706. Under Section 405(i) of the Act, the Post Office Department fixes the rates at which foreign countries

are to pay for the carriage of such mails and has the responsibility for effecting collection of amounts due, but such amounts are the property of the carrier. At the end of the year 1941, Pan American had various uncollected foreign mail accounts from Axis or Axis dominated countries and set up reserves of approximately $432,000 to cover these amounts. In the *Trans-Atlantic Rate* case, Docket No. 370, decided July 17, 1944, the Board included as an allowable cost the amount of $432,000 as a provision for a reserve for uncollectible foreign mail accounts receivable.

In its opinion which became effective August 27, 1947,
217 Docket No. 1706, the Board stated that "any amounts which have been or in the future shall be collected on account of the $432,224 foreign mail pay receivables here in issue shall be offset by the Postmaster General against mail payments otherwise due the respondent, without regard to whether such payments originate from services performed by the respondent's Atlantic Division or from services performed by any of its other operating divisions."

Pan American has now appealed the Board's decision in Docket No. 1706 with the Court of Appeals of the District of Columbia, contending, among other things, that the treatment of the 1940-1941 foreign mail receivables prescribed by the Board amounts to a recapture of Pan American's earnings beyond the power of the Board. In its petition to the court, Pan American argues that whatever power the Board may have had with respect to these 1940-1941 foreign mail receivables, such power was exhausted when the Board made its final determination in the previous rate case, Docket No. 370. Pan American takes the position that the proviso in the Board's order, Docket No. 1706, relating to these receivables is an attempt to deal in a case relating to 1945 with issues which were completely disposed of in the previous case, Docket No. 370. Pan American thus argues that once the Board has made a rate order final, such as that in Docket No. 370, the Board is without power to make new determinations on matters which should properly have been dealt with by such order.

It should be noted that a final order of the Board in Docket No. 370 was issued on July 17, 1944, and the proceeding in Docket 1706 was not instituted until December 30, 1944. Nevertheless, the Board exercised its retroactive power in connection with a matter which occurred four years prior to the institution of the proceeding and which was disposed of by final order of the Board six months prior to the institution of the proceeding. In this connection it is interesting to note the language of the majority in the instant proceeding which states as follows:

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> "We should be allowed as a matter of effective administration to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief whether in the form of revision of rates or otherwise. The carrier should be enabled to rest upon a similar assumption until some action by us is initiated. Any other approach would mean that those important relationships between the carrier and the government which center about rates and which at the time are deemed satisfactory by both parties and upon which both parties have acted and planned could later be re-examined and reshaped. This would imperil stability both from the standpoint of the government and of the carrier, for it is idle to talk of rates being fixed if at any time thereafter they could be retroactively revised."

While it is not my purpose to pass upon the merits of Pan American's contentions in this dissent, yet it is impossible to reconcile the majority's position in the instant proceeding with the action taken by the Board in the *Pan American* case, Docket No. 1706. In my opinion these two decisions are inconsistent, and it must be concluded that the majority has now reversed itself on the position taken in the *Pan American* case in August of this year.

The majority opinion confuses the terms "power" and "discretion." Section 406 gives the Board the power to fix a rate retroactively. How the Board will exercise that power is a question of discretion to be determined after

notice and hearing upon the facts of each case, and the date of filing of the petition has nothing to do with the Board's power. Consideration may, of course, be given to the
219 date of filing the petition, but that is a matter of Board discretion. In the *Pan American Rate* case the Board stated:

> "The relative weight to be given to each of the four standards which the statute has thus set forth and to the three national purposes enumerated under the fourth standard are matters which *lie solely within the discretion of the Board.* * * * Section 406(b) of the Act lays upon the Board the exercise of a *discretionary judgment in the determination of rates* which will, among other things, enable the air carrier under honest, economical and efficient management 'to maintain and continue the development of air transportation to the extent and of the character and quality required' for the triple national purposes to be served." [Italics supplied]

In the *Mid-Continent Rate* case,[4] the Board stated:

> "The fixing of 'fair and reasonable rates of compensation for the transportation of mail by aircraft' under Section 406(a) and (b) of the Act involves the delegation of a broad *discretionary* power which must be exercised in the light of certain considerations which Congress has specifically prescribed." [Italics supplied]

In these decisions the Board recognized that the fixing of a rate involves the Board's discretionary power. Under the majority's interpretation of Section 406 in the instant proceeding, however, it is difficult, if not impossible, to reconcile such an interpretation with the broad statutory objectives of Section 2 and Section 406 of the Act. The power to set a retroactive rate is there whether or not a rate petition is filed, and the exercise of this power is purely discretionary with the Board. To hold otherwise would invite carriers to continuously have rate petitions on file

[3] 1 C. A. A. 220, 253, 254.
[4] 1 C. A. A. 45, 55.

with the Board to protect themselves against losses which might occur before such petitions could be filed. In
220 such a situation there would still be left to the Board's discretion the relief to be accorded and the majority's objective to secure finality of judgment would still be missing because there would always be a new rate case pending as soon as the old one is disposed of.

For legal support of its position, the majority leans heavily upon its assumption that the Civil Aeronautics Act is sufficiently similar to other utility statutes as to allow the same construction. While there are similarities of language and objectives, yet the differences both of *language* and *objectives* are such as to render the utility cases relied upon by the majority of little value in construing the Civil Aeronautics Act. I shall take up first the differences in language. Reference is made by the majority to the Railway Mail Pay Act of 1916 and the Air Mail Act of 1934. Examination of these statutes reveals that the language with respect to rate-making is entirely different from the provisions of Section 406 of the Civil Aeronautics Act. Under the Railway Mail Pay Act, rates fixed by the Commission "shall continue in force until changed by the Commission after due notice and hearing." Even under that language the Supreme Court held in the *New York Central* case[1] that a new rate could be effective as of the date of commencement of the proceeding. The Air Mail Act of 1934 also provided that rates fixed by the Commission
"shall continue in force until changed by the said
221 Commission after due notice and hearing." In 1938, Congress passed the Civil Aeronautics Act which abandoned the restrictive phrases contained in the Railway Mail Pay Act and the Air Mail Act. Congress was aware of the fact that the restrictive language of the earlier statutes (which was abandoned in the Civil Aeronautics Act) permitted retroactive rates at least as far back as the date of commencement of the proceeding. If Congress felt that

[1] *U. S. v. New York Central R. R.*, 279 U. S. 73 (1929).

the Board's power to fix rates should be limited to the period starting with the commencement of a rate proceeding, it would have been a simple matter to carry over into the Civil Aeronautics Act the language used in the Railway Mail Pay Act and the Air Mail Act. But Congress did not do this. When one act grows out of another act it is entirely possible for the two statutes to have identical language, even where not intended, such language having been inadvertently carried into the new act. But when the language has been specifically changed, it is reasonable to conclude that the difference is deliberate and intentional. There is not a word of limitation in the Board's power in Section 406 of the Act, neither as to the amount of mail compensation nor the period for which it may be paid. To be sure, the power to fix rates which "shall continue in force until changed by the Commission after due notice and hearing" is entirely different from the power "to make such rates effective from such date as it [the Board] shall determine to be proper."

The majority points out that there is no reference in the Civil Aeronautics Act to subsidy as such and asserts that insofar as the Civil Aeronautics Act may be said to authorize subsidy, the Air Mail Act of 1934 originally, and as amended by the Air Mail Act of 1935, authorized
222 subsidy in much the same fashion. This is an erroneous conception of the 1934 and 1935 Acts. Under the Air Mail Act of 1934, the Postmaster General was authorized to award contracts to the lowest bidder provided the low bid was not in excess of 33 1/3 cents for loads not exceeding 300 pounds plus one-tenth of such base rate for each additional 100 pounds. In no case was the payment to exceed 40 cents per airplane mile. The powers of the Interstate Commerce Commission over mail pay were extremely limited under this Act and were not comparable to the Board's powers under the Civil Aeronautics Act. The ICC was directed to fix the fair and reasonable rates for the transportation of air mail "over each air mail route.

but not in excess of the rates provided for in the Act,"[6] and to review at least once a year the rates being paid in order to be assured that no unreasonable profit was accruing to the contractors.[7] The Act further provided that contracts which had been satisfactorily performed should be "continued in effect for an indefinite period, subject to any reduction in the rate of payment therefor, and such additional conditions and terms as the said Commission may prescribe . . . "[8] This was interpreted to mean that the Commission could reduce the successful bid rates on the temporary contracts but that it was powerless to increase rates even where the bid rates were resulting in substantial losses.[9] Irrespective of legitimate operating
223 costs, no rate could exceed 33 1/3 cents per mile, and the aggregate compensation resulting from excess loads was limited to 40 cents per mile.[10] A further limitation on the Commission's rate making power was the direction to fix rates for *each route* which, in connection with the rates fixed by the Commission for all other routes, would keep the aggregate cost of air mail compensation after July 1, 1938, within the limits of the anticipated postal revenue therefrom.[11]

The Air Mail Act of 1934 was amended in 1935, limiting some of the obvious defects of this Act and broadening the powers and duties of the ICC. It is interesting to note, however, that Section 6(c) as amended, permitted the Commission to increase, as well as decrease, the contract rates, but the 33 1/3 and 40 cent limits were not lifted, and no change was made in the direction that rates should be adjusted so that by July 1, 1938, payments to carriers should be within the anticipated postal revenues from air mail.[12]

[6] Section 6 (a).
[7] Section 6 (b).
[8] Section 6 (c).
[9] Air Mail Compensation, 206 I. C. C. 675, 690 (1935).
[10] Section 3 (a).
[11] Section 6 (e).
[12] Section 6(c) as amended.

In view of the foregoing strict limitations imposed upon the Commission's power to fix mail rates under the Air Mail Acts of 1934 and 1935, it is obvious that these are not the provisions of a subsidy statute which of necessity must grant enough power to accomplish the objectives set out in the Act. Witness, for example, the powers of the Civil Aeronautics Act which places no limitation upon the amount or time of the payments. Furthermore, a comparison of the Civil Aeronautics Act with other subsidy stat-
224 utes reveals a striking similarity. For example, the following provisions are found in Section 2(e) of the Emergency Price Control Act of 1942:

> "Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may on behalf of the United States . . . make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof . . ."

This language is comparable to that used in Section 406(a) of the Civil Aeronautics Act except that the Emergency Price Control Act makes no mention of the date such subsidy payments are to be effective, whereas the Civil Aeronautics Act specifically empowers the Board "to make its rates effective from such date as it shall determine to be proper."

Besides the wide difference in *language* between the Civil Aeronautics Act and other utility statutes, there is also a vast difference in the *objectives* to be attained. So far as the protection of the public from excessive rates is concerned, the objective is similar, and the granting of authority for its accomplishment is similar, but so far as national defense is concerned, the objective is fundamentally different. One of the primary objectives of the Civil Aeronautics Act is the development of air transportation as an instrument of national defense, which objective does

not appear in the other utility statutes, and in order to accomplish it, the Act not only grants to the Board broader powers than are granted under the other utility statutes, but imposes upon it broader responsibilities. The
225 Civil Aeronautics Act is a subsidy statute and places upon the Board the responsibility not only for protecting the general public from excessively high passenger and property rates, but also of protecting the carrier from unfair or unreasonably low mail rates in order that its services may not be impaired to the extent that it would be unable to perform the objective of national defense intended by the statute.

The Board itself has recognized that the rate-making functions under the Civil Aeronautics Act are entirely different from those of public regulatory bodies in fixing rates for the ordinary public utility services. In the *Pan American Rate* case, *supra*, the Board pointed out that Section 406(b) provides standards for the Board's guidance in determining the mail rate to be paid in each case. After mentioning three standards to be considered, the Board stated:

> "Had the statute prescribed no further standards for our guidance in fixing rates for the transportation of mail by aircraft, our rate-making task would not differ fundamentally from that which faces the public regulatory body in the fixing of rates for the transportation of passengers and property or in fixing the rates for public utility services. But the statute does not stop with the three standards above named.
>
> "In adopting the Civil Aeronautics Act of 1938, Congress, as the legislative history of the act shows, was fully aware of the financial position of the American air carriers and knew that in the present developmental state of the air transport industry the air carriers, in most instances, would be unable to survive without revenues from the transportation of mail sufficiently large to make up for the deficiency in revenues from passenger and express sources. Yet the encouragement and development of an air transportation system adapted to the present and future needs of the for-
226 eign and domestic commerce of the United States and

of the national defense, as well as of the Postal Service was regarded as an essential national objective (Sec. 2 of the act.) To insure the fulfillment of that objective, Congress has imposed upon the Authority in Section 406(b) of the act, a duty to consider, in fixing the rate of compensation for the transportation of mail, another factor which affects in a vital degree the conclusion to be reached by the Authority. Thus, the Authority is required in fixing the rate to consider "the needs of each such carrier for compensation for the transportation of mail sufficient * * * together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Again in the *Mid-Continent Rate* case, *supra*, the Board referred to the factors to be taken into consideration in fixing a rate under Section 406(b) and stated:

> "The above factors which the Authority is directed to take into consideration in fixing and determining fair and reasonable rates under the act, differ from the tests which, under the influence of judicial decision during the past 40 years, have been set up for the guidance of public regulatory bodies in fixing rates for public utilities and common carriers . . . Sections 2 and 406, as well as other sections of the Civil Aeronautics Act, disclose the clear intent of Congress that the problems of civil aviation require special treatment."

These early pronouncements of the Board make it clear that the Board recognized a difference in its duties under the rate-making provisions of the Civil Aeronautics Act of 1938 and the non-subsidy statutes which regulate non-subsidized utilities. Under a subsidy statute it is essential for a government agency, if it is to be able to accomplish the objectives of the statute, to have the power to provide for retroactive payments, as borne out by the fact that most of the subsidy arrangements actually made under the Emergency Price Control Act covered payments prior to the filing of any application or petition.

227 Perhaps the clearest pronouncement of the Board's power is found in the *American Rate* case,[13] 3 C.A.B. 323, 331 (1942), which states:

> "We conclude that Sec. 406(a) of the Act vests in the Board *complete discretion* to determine the date upon which its orders thereunder shall become effective. In exercising this discretion, we are limited only by the procedural requirements of notice and hearing, and by the necessity of promoting the broad objectives of the Act."

Let us look at these "broad objectives of the Act" which the Board referred to in the *American Rate* case. In adopting the Civil Aeronautics Act of 1938, Congress was fully aware of the financial position of the American air carriers, and knew that in the developmental state of the air transport industry the air carriers would be unable to survive without revenues from the transportation of mail sufficiently large to make up for the deficiency in revenues from passenger and express sources. The encouragement and development of an air transportation system adapted to the present and future needs of the foreign and domestic commerce of the United States and of the national defense, as well as of the Postal service, was regarded as an es-

228 sential national objective. To insure the fulfillment of that objective, Congress imposed upon the Board in Section 406(b) of the Act a *duty* to consider in fixing the

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[13] It is of interest to note that Public Counsel in the *American* case, who is now general counsel of the Board, in oral argument stated,

"The language of the Act, Section 406(a), gives the Board the power to make such rates effective from such date as it shall determine to be proper. It seems to me that *the language confers the broadest sort of discretion on the Board to fix rates whenever in the exercise of its functions under the Act and in applying standards provided by the Act, decides it would be proper to fix a rate for a retroactive period.*

"*I don't know how Congress could have said in any more general terms, to have granted a discretionary power to fix rates prospectively or retroactively*, anything more general here, than in the words that have been selected in writing Section 406(a).

"It seems to me that the whole argument and contention of Mr. Hale and Mr. Westwood is directed to an attempt to show that these words 'to make the rate effective from such date as the Board shall determine to be proper,' do not mean as much as they say."

rate of compensation the need of each carrier for compensation for the transportation of mail sufficient to insure the performance of service, and together with all other revenues of the carrier to enable it under honest, efficient, and economical management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal service, and the national defense.

Thus, it should be remembered that the minimum compensatory rate guaranteed each certificated air carrier is not solely payment for the carriage of mail, but is also intended to effectuate other objectives, as the Board stated in the *American Rate* case, *supra:*

> "The use of mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the postal service."

Mail pay is merely a convenient mechanism for disbursing compensation for the performance by certificated air carriers of a triple service in behalf of the Government; i.e., for (1) Commerce, (2) Postal Service, and (3) the National Defense. The Board recognized this in one of its earliest rate decisions.[11]

> "* * * the provision of section 406(b) quoted above, as well as other provisions of the act, especially those of Title IV 'Air Carrier Economic Regulation', and
> 229 section 2, 'Declaration of Policy', leave no doubt of the intent of Congress to recognize a public interest in air transportation beyond that reflected in the Postal Service, and to provide compensation therefor to the air carriers performing the service * * *.
>
> "In fixing and determining fair and reasonable rates of air mail compensation, section 406(b) of the act directs that the Authority shall take into consideration, among other factors, the condition that a holder of a certificate authorizing the carriage of mail by aircraft must provide necessary and adequate facilities and service for such transportation, and must maintain such standards of service as may be prescribed, and

[11] See footnote 1, *supra*.

shall further take into consideration the need of such air carrier for mail compensation 'sufficient to insure the performance of such service and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.'

"The development and encouragement of air transportation through an air mail rate which takes into consideration the general factors of the public interest, as set forth in the act, require that the rate-making provisions of the act shall be administered in such a manner as to expedite and not retard the attainment for air carriers of an economically sound and stable condition. * * * "

The compensation which the carrier receives becomes compensation not only for carrying the mail, but for the building up of a system of air commerce which will serve the nation's commerce and security as well. The civil aviation policy of this Government has from its inception recognized the civil air transport industry as an essential part of the national defense. The years preceding the adoption of the Civil Aeronautics Act of 1938 disclose a long period of government sponsorship of the development of civil aviation. While federal policy in those years had ex-
230 pressly recognized the national concern in the development of air transportation as an essential instrumentality of the nation's commerce and postal service, Congress gave formal expression for the first time in the Civil Aeronautics Act to the importance of air transportation to the national security when it laid down a comprehensive policy of government financial aid and encouragement as a means of implementing the national defense objective. President Roosevelt recognized the importance of national defense to the air transportation system when he stated in a communication dated January 24, 1939, to the National Aviation Forum:

"Civil Aviation is clearly recognized as the backlog of national defense in the Civil Aeronautics Act which set up the effective machinery for a comprehensive national policy with respect to the air.

"Underlying the statute is the principle that the country's welfare in time of peace and its safety in time of war rests upon the existence of a stabilized aircraft production—an economically and technically sound air transportation system, both domestic and overseas—an adequate supply of well-trained civilian pilots and ground personnel.

"This new national policy, set up by the Congress, views American aviation as a special problem requiring special treatment. Aviation is the only form of transportation which operates in a medium which knows no frontiers but touches alike all countries of the earth. One fact which stands out is that hardly another civil activity of our people bears such a direct and intimate relation to the national security as the civil aviation . . . "

Civil Aviation was recognized as the backlog of national defense because if was believed that through a subsidized air transport industry more planes could be kept in the air,
231 more pilots and ground personnel trained, more airports kept up, more airways kept operating, more research conducted, and a more stable market provided for the aircraft manufacturing industry for less money than in any other way. It is doubtful that there would have been a subsidy for air transportation if it had not been considered essential to our national defense.

Congress did not fail to provide the Board with adequate power to carry out its obligations under the Act. Section 406(a) permits the Board to make mail rates effective from "such date as it shall be determined to be proper." The only date which can be "proper" is one which permits the Board to fulfill its obligations and meet the responsibilities imposed upon it by the Act for the accomplishment of the objectives set forth therein.

/s/ JOSH LEE.

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Docket No. 484
Docket No. 2849

Service of Order and Opinion

Order No: E-1032 and 1033

REGISTERED:

T.W.A., Att: George H. Clay, 101 W. 11th St., Kansas City 6, Mo.

P.C.A., Att: Henry Beecken, Washington National Airport, Wash., D. C.

Frank J. Delany, Solicitor, Solicitor's Office, Post Office Dept., Wash., D. C.

REGULAR:

Gerald B. Brophy, c/o TWA, 101 W. 11th St., Kansas City, Mo.

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Charles H. Murchison, Suite 1016, Ring Bldg., 18th and M Sts., N.W., Wash., D. C.

Robert Hankins, Suite 1016, Ring Bldg., 18th and M Sts., N.W., Wash., D. C.

Robert J. Wilson, c/o P.C.A., Washington National Airport, Wash., D. C.

Roy C. Frank, Solicitor's Office, Post Office Department, Wash., D. C.

Louis J. Doyle, Solicitor's Office, Post Office Department, Wash., D. C.

Mr. Fahey, Post Office Department, Rm. 5353, Wash., D. C.

Gary Campbell, General Accounting Office, Postal Division, Arcade Bldg., Asheville, N. C.

Joe D. Walstrom, Acting Chief, Aviation Division, State Dept., Wash., D. C.

SPECIAL MESSENGER:

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Hawkins, Mrs. } POD

Bulletin Board
Docket Section
Stough
Leasure
Examiner: Walsh B-102
Public Counsel: Burt B-37 Dick B-37 Schneider B-37
No Special Mail Cards

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9763

TRANSCONTINENTAL & WESTERN AIR, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On Petition for Review of Order of the Civil Aeronautics Board

Argued June 16, 1948. Decided August 2, 1948

Mr. Gerald B. Brophy for petitioner.

Mr. Hardy K. Maclay, Assistant General Counsel, Civil Aeronautics Board, with whom *Mr. Edward J. Hickey, Jr.*, Special Assistant to the Attorney General, *Mr. Emory T. Nunneley, Jr.*, General Counsel, Civil Aeronautics Board, *Mr. William C. Burt*, Chief, Rates Section, Civil Aeronautics Board, *Messrs. Louis B. Sissman* and *Warren L. Sharfman*, Attorneys, Civil Aeronautics Board, *Mr. George Morris Fay*, United States Attorney, and *Mr. Oliver Carter*, Acting Chief, Enforcement and Litigation Section, Civil Aeronautics Board, were on the brief, for respondent.

Before EDGERTON and PRETTYMAN, JJ., and KEECH, District Judge, sitting by designation.

PRETTYMAN, J.: This case is before us upon a petition to review an order of the Civil Aeronautics Board which denied petitioner's request that the Board fix a domestic rate for its carrying of the mail for the period January 1, 1946, to March 14, 1947.

By an order dated October 26, 1945, the Board had fixed such a rate for petitioner.[1] The show cause order in that proceeding had been issued January 1, 1945, and the ensuing rate order was made effective as of that date. No motion was made for the reconsideration of that rate order, and no appeal from it was taken.

Petitioner says that it lost money in every month after October, 1945, except June, 1946, in part because of common post-war development, rising costs and declining mail revenues, and in part because of conditions peculiar to petitioner, these latter being principally the

1. Transcontinental & Western Air, Inc., Mail Rates, 6 C.A.B. 595.

grounding of its four-engine Constellations by the Administrator of Civil Aeronautics and a strike of its pilots. Therefore, on March 13, 1947, it filed with the Board the petition which is the premise of the present proceeding. It requested a redetermination of its rates, beginning January 1, 1946. The Board dismissed that petition so far as it requested the fixing of a rate for the period prior to March 14, 1947.

The Board held that it had no power to increase mail rates retroactively to a period in which a final rate order previously entered by the Board was in effect and unchallenged. Its order of dismissal was upon that basis. Commissioner Lee dissented. TWA now presents five points, but all are directed to the question of power. Both parties have briefed and argued extensively that question and that alone.

Upon first impression, it would appear that the Board's order would be valid even if it had power to select an earlier date, since it admittedly had discretion to select March 14, 1947, as the effective date. If that were an accurate impression of the whole case, the question of the Board's power to do something it did not do would be immaterial. But we think we must determine the question, because TWA said to the Board, and says to us, that its rates for the period January 1, 1946, to March 14, 1947, were less than fair and reasonable, and that the order of the Board refusing to consider those rates was arbitrary, capricious and a denial of due process. The Board says it had no power to do otherwise. If it had the power to consider that period, its denial of the petition would have to be premised on something more substantial than mere refusal. It is true that even if we disagreed with the Board on that proposition, its order would not necessarily be invalid, because there would remain the exercise by the Board of the discretion, plainly conferred upon it by the statute, to choose an effective date for its rate orders. But that situation would seem to bring into operation those provisions of the statute which contemplate that under such circumstances we would reverse in a technical sense but remand for further consideration by the Board.[2] So we proceed to consider the question presented and argued.

We agree with the position of the Board. The conclusion depends upon the meaning of that portion of the statute[3] which provides that the Board is empowered and directed to fix fair and reasonable rates of compensation for the transportation of mail by aircraft "and to make such rates effective from such date as it shall determine to be proper".

In the first place, we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly specifies such power.[4] TWA says that the above-quoted provision of the statute supplies the requisite plain specification. But we think that that clause was inserted for the purpose of resolving a controversy concerning the power of the Board to make its rate orders effective as of the date when the proceeding began. The same controversy had existed in respect to railway mail pay and had been settled by the

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2 The language of the statute is "... and if need be, to order further proceedings by the Board." Sec. 1006(d) of the Act, 52 STAT. 1024 (1938), 49 U. S. C. A. § 646(d).

3 Sec. 406(a) of the Act, 52 STAT. 998 (1938), 49 U. S. C. A. § 486(a).

4 Nield v. District of Columbia, 71 App. D. C. 306, 314 *et seq.*, 110 F. 2d 246, 254 *et seq.* (1940), particularly the authorities cited in notes 35-39.

Supreme Court.[5] Under the Air Mail Act of 1934, as amended in 1935,[6] the Interstate Commerce Commission made its orders effective as of the date of the initiation of the proceedings, but there was sharp difference of opinion among members of the Commission as to the validity of that action.[7] The dissenting Commissioners were of the view that the *New York Central* case[8] rested upon the statutory provision compelling railroads to carry the mail, whereas the air mail statute contained no such compulsion. They thought that the absence of that compulsion removed the sole basis for the Court's upholding of retroactive effectiveness.

We need not repeat the long quotations from Congressional hearings, reports and debate relative to the legislative history of the Air Mail Act of 1938, presented to us by the parties.[9] Suffice it to say that the addition to the original bills of the "make effective" clause appears to have been designed to establish in the Board the same powers which had theretofore existed at the Interstate Commerce Commission in respect to railway mail.[10] And it had been established that the Interstate Commerce Commission could make its orders effective as of the date of the beginning of the proceedings; but it had never been claimed that the Interstate Commerce Commission had unfettered retroactive power.

The language of the disputed clause is not necessarily retroactive. It is as apt in reference to the future as it is to the past. A reading of the whole paragraph in which it appears as a clause, makes this clear. In this posture of affairs we must give great weight to the presumption against retroactivity and to the limited legislative purpose apparent from the history.

But quite apart from the inferences and presumptions just discussed, two major considerations lead us to our conclusion. The first is the clear nature of the scheme of the statute. There are at least two, and perhaps more, different schemes or plans possible in a system of payment for service such as this. The first is where a price per unit is fixed. In such an arrangement, the fixing of the price is customarily in advance; the contractor makes or loses as his economic skill permits, and he bears the risks of the operation. This is the method ordinarily employed by authorities in regulating the charges of public utilities. The word ordinarily used is "rates". The second general type, or plan, is where a net result of the operation, or of a unit thereof, is contemplated and provided for. In such an arrange-

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[5] United States v. N. Y. Central, 279 U. S. 73, 73 L. Ed. 619, 49 S. Ct. 260 (1929).

[6] 48 STAT. 933, as amended, 49 STAT. 614.

[7] Air Mail Compensation, 216 I. C. C. 166 (1936) (dissenting opinion at 191); Air Mail Compensation, 222 I. C. C. 602 (1937) (dissenting opinions at 610).

[8] *Supra* note 5.

[9] *Hearings before Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760*, 75th Cong., 1st Sess. 179, 180, 239, 291, 343, 483 85, 523, 525; H. R. REP. No. 911, 75th Cong., 1st Sess. 18; SEN. REP. No. 686, 75th Cong., 1st Sess.; *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738*, 75th Cong., 3d Sess.; *Hearings before Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess.; H. R. REP. No. 2254, 75th Cong., 3d Sess.; 81 CONG. REC. 8839, 8882, 9202, 9204; 83 CONG. REC. 6725.

[10] For a general history of the development, see "Federal Regulation of Aviation" by Ballard, 60 HARV. L. REV. 1233 (1947); particularly on Mail Compensation, *id.* at 1261.

ment, advance payments may be made to the contractor but the final figure cannot be determined until the operation, or the controlling unit thereof, is complete; the net to the contractor is the same no matter what the quality of the performance may be and he bears none of the risks of the operation. The so-called "cost-plus" contracts fall within this classification.

We think that the scheme of the statute before us is of the former kind. The statute[11] directs the Board to fix "fair and reasonable rates of compensation for the transportation of mail by aircraft, to prescribe the method ("aircraft-mile, pound-mile, weight, space, or any combination thereof") for ascertaining such rates for each carrier; and it requires the Postmaster General to pay "the rates so fixed and determined". The statute further provides that the Board shall take into consideration, "among other factors," the required facilities and service, the character and quality of such service "and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

We think that anyone reading the whole of the statutory provisions relative to these rates[12] must conclude that they specify the fixing of a rate, or rates, for the carrying of a physical unit of mail, and that they contemplate future operation. There is no reference to an offset against past losses or to a diminution of past profits. The whole is cast in the form of the usual public utility rate-determination measure. Such measures are frequently made effective as of the date of the inauguration of the proceedings, but never, so far as we know, for periods prior thereto.

It is argued that the consideration of the "need" of the carrier for adequate revenue, required by the last above-quoted provision of the statute, is necessarily retroactive in operation. We do not think so. Anticipated need is as clearly meant as is demonstrated inadequacy. The provision is not different in principle from the need for sufficient revenue to insure financial stability, which is the rule applicable to public utilities generally[13] and which certainly contemplates the future and not the past.

We cannot find in this statute any language which indicates that Congress intended to guarantee to every carrier a profit.

The second major proposition which impels our conclusion is the result which would ensue if the statute were given unlimited retroactive effect. If the Board could redetermine rates for a past period when the carrier has made less than an adequate profit, or no profit at all, it could do so when the carrier has made more than an adequate profit. This statute makes no differentiation. The financial confusion which would follow from the latter conclusion seems obvious. No rate order would be final. No dividend declaration would be secure

11 Sec. 406 of the Act, 52 STAT. 995, 49 U. S. C. A. § 486.

12 *Supra* note 11.

13 Federal Power Comm'n v. Hope Natural Gas Co., 320 U. S. 591; 88 L. Ed. 333, 64 S. Ct. 281 (1944).

No large commitment would be conclusively feasible. No offering of securities would have a firm foundation. We find no indication that Congress meant to create so great uncertainty. We would not read a statute as yielding such results unless the language was clear and certain. We think that if Congress had intended to provide for recoupment of past losses, it would necessarily have spelled out the terms of the proposal and not have left it to a clause which, if interpreted with that effect, would also have so obviously disastrous effects.

The Board urges long administrative interpretation in support of its position, but our examination of its references in that respect shows that they dealt with policy and not with power.[14] The Board asserted its policy "Aside from the question of whether it has the statutory power to review a rate prior to the date of the institution of the proceeding . . . ."[15] Thus, it has never gone back of the inauguration of the proceeding, but, until this case, it has never asserted its lack of power to do so. TWA, on the other hand, urges what it considers examples of retroactive application of Board orders. But we do not find those instances indicative of the retroactivity which is necessary to support its position here. TWA also urges the implications from the Board's failure, over the years, to say it had no retroactive power. We think that the administrative history of this statute has no material bearing one way or the other upon the question of statutory power. Our conclusion, as we have said, rests upon the two major propositions which we have discussed.

The order of the Board is

Affirmed.

[14] Continental A. L., Mail Rates—Routes Nos. 29 and 43, 2 C.A.B. 683 (1941); Continental A. L., Mail Rates—Routes 29 and 43, 3 C.A.B. 395 (1942); Mid Continent Air., Mail Rates—Routes Nos. 26 and 48, 3 C.A.B. 464, 466 (1942); Braniff Air., Mail Rates—Routes 9, 15 and 50, 3 C.A.B. 633, 635-37 (1942); Transcontinental & W. A., Mail Rates, 4 C.A.B. 139, 143 (1943); All American Aviation, Mail Rate—Route No. 49, 4 C.A.B. 354, 357 (1943); Pan American Airways, Inc., Alaska Mail Rates, 4 C.A.B. 61, 69 (1944); Caribbean Atlantic Air., Mail Rate, 7 C.A.B. 943, 946 (1947).

[15] Continental A. L., Mail Rates—Routes 29 and 43, 3 C.A.B. 395, 401 (1942).

[fol. 116] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 2, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9763

TRANSCONTINENTAL & WESTERN AIR, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

On Petition for Review of Order of the Civil Aeronautics Board

Before Edgerton and Prettyman, JJ., and Keech, District Judge Sitting by Designation

JUDGMENT AND DECREE

This cause came on to be heard on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

On consideration whereof, It is now here adjudged and decreed by this Court that the order of the said Civil Aeronautics Board on review in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Prettyman.

Dated August 2, 1948.

[fol. 117] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 18, 1948. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Civil Action No. 9763

TRANSCONTINENTAL & WESTERN AIR, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

Gerald B. Brophy, Attorney for Petitioner.

Certificate of Service

I certify that on this date I have caused the foregoing designation to be served upon all parties to this proceeding by mailing copies properly addressed with postage prepaid to Emory T. Nunneley, Jr., General Counsel, and William C. Burt, Chief, Rates Section, Civil Aeronautics Board, Washington 25, D. C., Edward J. Hickey, Jr., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C., and Roy C. Frank, Solicitor's Office, Post Office Department, Washington 25, D. C.

Dated, New York, N. Y., October 18, 1948.

Gerald B. Brophy, Attorney for Transcontinental & Western Air, Inc.

[fol. 118] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 117, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for petitioner in the case of: Transcontinental & Western Air, Inc., Petitioner, vs. Civil Aeronautics Board, Respondent, No. 9763, October Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this nineteenth day of October, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 119] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 6, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration or decision of this application.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 38

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SUPPORTING BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No.

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Transcontinental & Western Air, Inc., respectfully shows to this Court:

Statement of the Matter Involved

Petitioner is an air carrier engaged in transporting persons, property and mail by aircraft in the United States and elsewhere under certificates of public convenience and necessity issued to it by the respondent, Civil Aeronautics

Board, under the Civil Aeronautics Act of 1938 as amended (52 Stat. 977 ff., 49 U. S. C. §§401-680).*

Section 406(a)(1) of the Act empowers and directs the Board, upon its own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper . . ."

1. The Petition for a New Rate

By petition filed March 14, 1947 (8-13) TWA applied to the Board, pursuant to §406 of the Act, for an order fixing and determining fair and reasonable rates of compensation, effective January 1, 1946, for transporting mail by aircraft over certain routes operated by it wholly within the United States, designated as routes nos. 2, 38, 44 and 58. That petition stated, in substance, the following facts.

By order dated October 26, 1945 the Board had fixed a rate of 45¢ per ton mile for carrying mail over TWA's domestic routes. This rate was made effective as of January 1, 1945 (10). TWA lost money in every month after the issuance of that order except June 1946 (9-10). These losses were partly due to a common postwar experience:

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* For brevity, the following abbreviations will be used in this petition and the accompanying brief. Numbers in parentheses refer to the pages of the Transcript of the Record filed herein. The "Act" means the Civil Aeronautics Act of 1938, as amended. The Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called "the Board." Petitioner will sometimes be called "TWA."

Unless otherwise stated, all italics are ours.

costs kept rising while mail revenue declined (8). They were largely caused, however, by conditions peculiar to TWA.

TWA first received new 4-engine Constellation aircraft in September 1945 (8). Because of certain controversies, these airplanes were not placed in service until February 1946 (8-9). By June 1946 enough Constellations were in operation to enable TWA to report a net profit for that one month (9).

On July 11, 1946, however, all Constellations were suddenly grounded by the Administrator of Civil Aeronautics (9). This grounding was beyond TWA's control. No other domestic airline then had Constellations in operation (9). Because of the grounding, all of TWA's Constellations were out of revenue service until the middle of September 1946, and many for even longer (9). Meanwhile virtually all TWA's costs continued (9). Instead of enjoying anticipated profits from summer operations, TWA suffered serious losses (9).

That blow was hardly over when, on October 21, 1946, TWA's operations were completely shut down by a strike of its pilots (9). The pilots had demanded higher wages. A Board appointed by the President of the United States recommended an increased pay scale. TWA promptly put this recommendation into effect (9). Nonetheless the pilots served an ultimatum demanding an even higher wage scale within 30 hours (9). If TWA had granted the pilots' demand, its costs would have been even higher (9). The strike then ensued. The shutdown following the strike continued for almost four weeks and caused further severe financial losses (9).

The petition alleged that the old 45¢ rate had not been fair and reasonable since January 1, 1946 (10) and, pursuant to §406(c) of the Act, proposed a new rate (11).

2. The Procedure Below

On May 27, 1947, Public Counsel of the Board moved that the Board, without hearing the merits, dismiss so much of TWA's petition as requested a new mail rate for the period from January 1, 1946 to March 14, 1947, the date the petition was filed. The principal ground of this motion was that "as a matter of sound general policy" the Board should not make such a retroactive adjustment (15).

On June 11, 1947, TWA answered this motion, pointing out that the Board had the duty to hear and consider the merits of any petition involving matters within its jurisdiction (22-25). Thereafter, on June 23, 1947, Public Counsel amended their motion to dismiss by adding a new ground: that the Board had "no authority" to adjust a rate retroactively (38). The Postmaster General supported this position (41).

After oral argument (41-60), the Board granted the motion by an order dated December 2, 1947 (91). Dismissal was not on the merits, or in the exercise of discretion, but solely on the ground—advanced by a majority of three members—that the Board lacked power to fix a rate effective before the date the petition was filed (63-90). Member Lee dissented with an opinion (92-108).

On January 30, 1948, TWA duly applied for review of the Board's order by the United States Court of Appeals for the District of Columbia which, on August 2, 1948, affirmed the Board's order with an opinion by Judge Prettyman (111-1[illegible]).

Jurisdictional Statement

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals for the District of Columbia by virtue of the following statutory provisions: 28 U. S. C. §1254 (see Pub. L. 773, 80th Cong., 2d Sess., ch. 646) and §1006(f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U. S. C. §646(f)).

The Questions Presented

1. *Does the Board have power to make a new mail rate effective from a date prior to the initiation of a proceeding to revise an old rate?*

Petitioner argued that the plain language of §406(a)(1), by which the Board is "empowered and directed" to fix fair and reasonable rates of compensation for carrying mail, and "to make such rates effective from such date as it shall determine to be proper" confers upon the Board the power to set a rate effective as of any date which, after a review of all the facts, it determines to be proper, whether or not that date antedates the filing of the petition. (All parties admit that a rate may be made retrospectively effective back to the filing date). Petitioner maintained that this interpretation was supported by the specific language of §406, by the Act's general arrangement and purposes, by the legislative history of the Act and by its administrative construction. The Court of Appeals concluded, however, that the language of §406(a)(1) was insufficient to overcome a supposed "almost conclusive presumption against the power to take retroactive action" and found that the Board lacked the claimed authority.

2. *Is the Act, if interpreted to deny the Board the power to increase a mail rate effective prior to the initiation of a mail rate proceeding, in violation of the Fifth Amendment to the Constitution of the United States?*

Petitioner is required by the Act to transport air mail. Petitioner argued that if the Act were interpreted to deny any power in the Board to fix a new mail rate effective prior to the initiation of a mail rate proceeding, the Act would be unconstitutional because it would deprive petitioner of its property without due process of law, and take such property without just compensation, by compelling it to transport mail even though the rate for such transportation had proved insufficient to afford petitioner just compensation. The Court of Appeals did not specifically pass upon this contention but, by upholding the Board's order, necessarily decided that, even under this interpretation, the Act did not violate the Constitution.

Reasons For the Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia has decided questions of general importance which have not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of the Constitution of

the United States which has not been, but should be, settled by this Court.

4. The United States Court of Appeals for the District of Columbia has failed to give proper effect to several applicable decisions of this Court.

These reasons are discussed in petitioner's attached brief.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled in its Docket No. 9763 (April Term 1948), *Transcontinental & Western Air, Inc., Petitioner* v. *Civil Aeronautics Board, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order herein of the said United States Court of Appeals for the District of Columbia be reversed by this Court and for such other, further or different relief as to this Court may seem proper.

Dated, New York, New York, October 29, 1948.

GERALD B. BROPHY,
Counsel for Transcontinental &
Western Air, Inc., Petitioner.

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No.

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported. It appears in the certified copy of the Transcript of Record (111-115). The opinions of the majority and dissenting members of the Board also appear in the Transcript (60-108).

Jurisdiction

Reference is made to the jurisdictional statement in the petition (*supra*, p. 5).

Statement of the Case

Reference is made to the "statement of the matter involved" in the petition (*supra*, p. 1).

Specification of Errors

1. The Court of Appeals erred in holding that the Act does not empower the Board to make a new mail rate effective from a date prior to the initiation of a proceeding to revise a rate previously fixed.

2. The Court of Appeals erred in failing to hold that the Act, and particularly §406(a)(1) thereof, delegates to the Board the power of Congress to revise mail rates retrospectively to any past date determined to be proper.

3. The Court of Appeals erred in holding that the Board's power under the Act was limited by "an almost conclusive presumption against power to take retroactive action," when no such presumption exists.

4. The Court of Appeals erred in holding that §406(a)(1) of the Act should be judicially circumscribed by false analogies to other statutes, which differ completely in language and purpose, and particularly to statutes regulating the rates of public utilities engaged in two-dimensional transit.

5. The Court of Appeals erred in holding that the Board is empowered to change mail rates only prospectively and in failing to hold that the practical considerations which compel public utility rates to be changed only prospectively have no application to mail compensation.

6. The Court of Appeals erred in failing to hold that the Board's previous exercise and acknowledgment of its power to make mail rates effective as of dates prior to the institution of a rate proceeding constituted an administrative interpretation entitled to particular weight in the construction of the Act.

7. The Court of Appeals erred in holding that the legislative history of the Act showed that the provision of §406(a) giving the Board power "to make such rates effective from such date as it shall determine to be proper" was added only for a limited purpose, and that this language should be given such limited effect.

8. The Court of Appeals erred in holding that the Board was not authorized to increase rates effective prior to the initiation of a proceeding because it would therefore necessarily be authorized also to recapture a substantial portion of any excessive profits earned prior thereto.

9. The Court of Appeals erred in failing to hold that if the Act were interpreted to deny the Board any power to increase mail rates, effective from a date prior to initiation of a proceeding to revise an old rate, the Act would violate the Fifth Amendment to the United States Constitution, in that it would deprive petitioner of property without due process of law and take its property without just compensation.

10. The Court of Appeals erred in affirming the order of the Board.

THE IMPORTANCE OF THIS CASE

This case involves a novel issue of interpretation of an important and unique act of Congress. Besides presenting several important legal questions which it would be desirable for this Court to settle, the decision below has grave practical consequences.

The question of the Board's power to adjust mail pay is vital to the entire air transport industry. Apart from its effect on future proceedings, the decision below affects at least six other current proceedings—one of which is already on appeal—in which the problems involved here have already been raised.* It is peculiarly important to resolve those problems at this time because the air transportation industry is now in a critical financial condition.

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* *Capital Airlines, Inc.* v. *Civil Aeronautics Board* (Court of Appeals, D. C., Docket No. 9870, under decision) (carrier on January 14, 1947 requested increased mail pay retroactive to June 1, 1942; Board contends that it lacks authority to increase compensation prior to filing date); *United Air Lines, Inc., Mail Rates*, Order No. E-1355, April 7, 1948 (carrier on July 1, 1947 requested increased mail pay retroactive to January 1, 1947; Board held it lacks authority to increase compensation prior to filing date); *Northwest Airlines, Inc., Mail Rates*, Order No. E-1353, April 7, 1948 (carrier on December 8, 1947 requested increased mail pay effective November 1, 1946; Board held that it lacks authority to increase compensation prior to filing date); *American Airlines, Inc., Mail Rates*, Order No. 1351, April 7, 1948 (proceeding instituted by Board order of April 7, 1948; carrier requests compensation retroactive to at least January 1, 1948; Board contends that it lacks authority to increase compensation prior to date of initiation of proceeding); *Delta Air Lines, Inc., Mail Rates*, Order No. E-1959, September 7, 1948 (carrier on September 9, 1947 requested increased mail pay retroactive to September 1, 1946; Board held it lacks authority to increase compensation prior to filing date); *Alaska Airlines, Inc.*, Order No. E-1885, Aug. 13, 1948, see *infra*, p. B3, note *.

At the beginning of 1948 the Air Policy Commission, appointed by President Truman to assist in formulating an integrated national aviation policy, unanimously reported:

> "The air lines, the most important element of civil aviation, are passing through one of the most serious crises of their history. The domestic trunk lines of the country suffered an operating loss of approximately $22,000,000 in the fiscal year ending June 30, 1947.
>
> "This situation is significant for two reasons. If not relieved it will contribute to the rapid deterioration of air-line service to the public. A second reason is now of even greater importance. The air lines have a fleet of aircraft of great value to the military services as a reserve in time of war. As a potential military auxiliary, the air lines must be kept strong and healthy. They are not in such a condition at the present time."*

The President's Air Policy Commission found that while the industry's difficulties resulted from a variety of causes, the over-all situation was the same throughout:

> "The revenue from passengers and cargo, plus a revenue for the carriage of the mail roughly equal to the passenger rate, will not support the operations of many of the companies. If they are to continue in operation and start again up the ladder toward self-sufficiency the Government will have to increase the mail rates" (pp. 100-101).

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* *Survival in the Air Age*, Report by the President's Air Policy Commission (January 1, 1948), p. 99. See also, *National Aviation Policy*, Report of Congressional Aviation Policy Board, 80th Cong., 2d Sess. (March 1, 1948), pp. 1, 16; Civil Aeronautics Board, Annual Report (1947), p. 7.

The President's Commission after pointing out that Congress had, through the Act, adopted a policy of governmental financial aid to the airlines (p. 100), concluded:

> "We consider that direct Government financial aid to commercial air lines is fully justified on grounds of national security and economic welfare. We believe the air transport system of this country can, with such aid now, become self-supporting in the future. We are convinced that any impartial investigators of air transport would endorse the use of public funds to obtain such a sound air transportation system. This means the continued granting of subsidies to air lines for an additional period" (p. 102).

Since the date of the Commission's report, the airlines' situation has, if anything, grown worse. The domestic trunk lines suffered further operating losses approximating $15,500,000 in the twelve months ending June 30, 1948.* The Civil Aeronautics Board has found that TWA and United Air Lines, Inc., two of the nation's largest air carriers, are in "critical financial condition" (*Transcontinental & Western Air, Inc.*, Order No. E-1520, May 7, 1948, p. 1). Two months ago the President found it necessary to ask the Reconstruction Finance Corporation to find suitable means by which the air transport industry can obtain proper financing.** Meanwhile, the need for national preparedness has increased and the airlift program into Berlin has graphically demonstrated the value of transport aviation as a military auxiliary.

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* *American Aviation Daily*, Statistical Supp., Sept. 30, 1947; Apr. 22, 1948; Oct. 14, 1948.

** *American Aviation Daily*, Aug. 12, 1948, p. 232.

The decision below places a formidable obstacle in the path of the industry's recovery. A series of groundings, strikes, crashes and other crises, together with generally increased postwar operating costs, have proven the current "service" mail rates, set in 1944 and 1945 in rather optimistic expectations of future operations, to be woefully inadequate. These rates did not, of course, contemplate the crises which have occurred. Future measures alone may be utterly insufficient to restore the industry's health. When a soldier's strength has been sapped because his prescribed diet has proved too scanty, the Army medical officer does not content himself with increasing his rations in the future. If needed to repair the ravages of past mistakes, plasma is administered promptly, and its quantity is determined by the actual needs of the patient, not by the date on which he reported at sick call. The air transport industry occupies a precisely similar situation. Yet the decision below prevents the Board from remedying inadequacies of its past rate predictions by confining it to future palliatives.* The Board is held impotent to take all necessary measures, irrespective of the urgency of the case and the paramount needs of the national interest. That holding has been reached by a process of strained interpretation and a complete disregard of the principle enunciated by this Court in *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 107-108, when discussing this Act that "we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

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*Whether the petitioner is or is not entitled to relief, on the merits, is not the question here. The merits have not been examined—the Board has been held powerless to examine them.

POINT I

The Act clearly delegates to the Board the power which is now held non-existent.

Determining the compensation for carrying the mails in the future always involves a prophecy. Especially is that true where air transportation is concerned. "In air transportation we can see but dimly the shape of things to come" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 339). "The determination of a fair rate necessarily includes consideration of the susceptibility of the industry to large and unpredictable fluctuations of net operating income" (*Delta Air Corp.—Mail Rates for Route Nos. 24 and 54*, 3 C. A. B. 261, 285). The Board recently remarked on "the inherent weakness in prophecy as to revenues and expenses" (*Pan American Airways, Inc.*, Order No. E-771, p. 6, Aug. 25, 1947), and emphasized that fact when it set TWA's mail rates in 1945. *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 597-598, 600, 601.

Any determination of air mail rates for the future is therefore peculiarly "a forecast subject to all the frailties of prophecy" (*United Air Lines, Inc.* v. *Civil Aeronautics Board*, 81 App. D. C. 89, 95; 155 F. [2d] 169, 175). Events often belie the prophecy. When a rate becomes unfair, revision of the prophecy in light of the actual facts is desirable and, when the carrier is obliged to carry the mail—as here—constitutionally mandatory.

Congress has repeatedly adjusted mail rates retroactively by specific legislation—both downwards* and upwards.** Changing rates by special legislation is, however, a cumbersome and slow process. Adjustment by an administrative agency is flexible and less dilatory. Hence Congress created the Board to take over the burden for it.

Presumably Congress intended to confer sufficiently broad power to enable the Board to cope with all situations that might arise, thus reducing appeals for Congressional relief to a minimum. In fact, by the unique language of §406(a)(1) of the Act—itself a unique statute—Congress clearly delegated to the Board plenary power to correct false prophecies by adjusting mail rates retroactively, irrespective of the filing date of the rate proceeding.

By §406(a)(1) the Board is "empowered and directed" to "make such rates effective from such date as it shall determine to be proper." On its face, this language is perfectly clear. Indeed, in 1943 the Board remarked on "the *plain* language of the statute relative to the Board's dis-

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* See, *e.g., Missouri, Kansas & Texas Ry. Co.* v. *U. S.*, 256 U. S. 610, 614; *Eastern Rd. Co.* v. *U. S.*, 129 U. S. 391, 395; *Jacksonville, Pensacola & Mobile Rd. Co.* v. *U. S.*, 118 U. S. 626; *Wisconsin Central Rd. Co.* v. *U. S.*, 164 U. S. 190; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *U. S.*, 198 U. S. 385.

** See, for instance, Act of July 28, 1916, c. 261, 39 Stat. 425, mentioned in *St. Louis Southwestern Ry. Co.* v. *U. S.*, 262 U. S. 70, 73, footnote 2. See also Act of *August* 14, 1935, c. 530, 49 Stat. 617, §8, providing that compensation for carrying air mail under certain contracts should be paid "on and after *March* 1, 1935 . . . at the rate fixed by order of the Commission," applied in *Air Mail Compensation*, 222 I. C. C. 602, 606; *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, 401-402; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 510; *Air Mail Rate for Route No. 2*, 231 I. C. C. 229, 231.

cretionary power to make rates effective from such date as it deems proper" (*American Airlines, Inc. et al., Mail Rates*, 4 C. A. B. 90, 93). In 1947, curiously enough, it found that "ambiguity is clearly present" (68).

More comprehensive words than are found in §406(a)(1) would be hard to imagine. "The language of section 406(a) gives to the Authority [Board] the right to exercise a sound discretion in determining the proper date on which a rate shall be made effective" (*Pan American Airways Co. [of Nevada]—Mail Rates*, 1 C. A. A. 385, 409). No limitations on that discretion are imposed, although of course the Board must regard the statutory objectives. In 1942 the Board stated this forcefully in *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 331:

> "We conclude that section 406(a) of the Act vests in the Board *complete discretion* to determine the date upon which its orders thereunder shall become effective. In exercising this discretion, we are limited *only* by the procedural requirements of notice and hearing and by the necessity of promoting the broad objectives of the Act."

It reiterated that conclusion in *American Airlines, Inc. et al., Mail Rates*, 4 C. A. B. 90, 92.

Thus the unwieldy process of petitioning Congress for legislation increasing a rate retroactively has been discarded. Of course the Board is not compelled to make retroactive changes; but it must weigh all the facts of each particular case and select that date which will be proper—whether the day on which its order is issued, a future day, or a past day which may or may not antedate the institution of the rate proceeding. Complete pliability is the essence of the statutory scheme in this respect.

The sweeping scope of §406(a)(1) is illuminated by the contrast with other parts of the Act dealing with public utility rates for carrying passengers and cargo.

All air carriers must file with the Board "tariffs showing all rates, fares and charges for air transportation," under §403(a) of the Act (52 Stat. 992, 49 U. S. C. §483(a)). The carrier may change the rates, but only prospectively. "No change shall be made in any rate, fare, or charge . . . specified in any effective tariff . . . except *after* thirty days' notice of the proposed change . . . The Board may in the public interest . . . allow such change upon notice less than that herein specified . . ." (§403(c) of the Act: 52 Stat. 992, 49 U. S. C. §483(c)). Likewise the Board may review the filed rates and prescribe different ones, but only *in futuro;* for §1002(d) of the Act provides (52 Stat. 1018, 49 U. S. C. §642(d)):

> "Whenever, after notice and hearing . . . the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier . . . is or will be unjust or unreasonable . . . the Board shall determine and prescribe the lawful rate, fare, or charge . . . *thereafter* to be demanded, charged, collected or received or the lawful classification, rule, regulation or practice *thereafter* to be made effective . . ."

Similarly, §404(a) of the Act (52 Stat. 993, 49 U. S. C. §484(a)) requires air carriers to "establish just, reasonable, and equitable divisions" of joint passenger and cargo rates "as between air carriers." The Board may "upon complaint or upon its own initiative" investigate "the divisions of joint rates" and "prescribe the just, reasonable, and equitable divisions thereof to be received by the several

air carriers" (§1002(h), 52 Stat. 1020, 49 U. S. C. §642(h)). That section goes on to say:

> "The Board may require the adjustment of divisions between such air carriers *from the date of filing the complaint* or entry of order of investigation, *or such other date subsequent thereto*, as the Board finds to be just, reasonable and equitable."

Thus when Congress wanted to prevent the Board from taking retrospective action, it said so. When it wanted to confer power to take action retrospectively, but only to the time of the filing of a proceeding, it said so. It said nothing of the sort in §406(a)(1). Instead it gave the Board full authority to make mail pay rates "effective from such date"—present, past or future—"as it shall determine to be proper." This marked contrast between §406(a)(1) and the other provisions of the Act was completely ignored below.

Into this simple, flexible statute, the opinion below reads a rigid limitation on the Board's power. A rate may become unfair and confiscatory on one day, but if the rate proceeding does not begin until a week later, the Board is held powerless to remedy the injustice completely by making the new rate effective as of the day when it became confiscatory. It may grant full relief only if, by some fortuitous coincidence, a rate proceeding was pending on that day for some totally different reason.

Thus, on March 1 two airlines may be equally affected by the sudden grounding of airplanes which they both use.*

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* In *Braniff Airways, Inc.*, Order No. E-1931, Sept. 2, 1948, the Board pointed out that "costs attributable to the grounding of aircraft types are neither normal nor recurrent in nature," and "are neither predictable nor capable of actual measurement on a prospective basis" (p. 13).

If a rate proceeding involving airline X happens to be pending on that day, the Board is free to adjust X's mail rates as of March 1, to allow for the increased costs due to the grounding. No rate proceeding involving airline Y, however, may be pending on March 1 and one is not begun until April 1. Although Y's need for increased mail pay may be exactly the same as X's, the Board is now held unable to adjust Y's mail rates back to March 1; it must stop short at April 1, when Y's rate proceeding began.*

The Act contains no such limitation on the Board's power. It has simply been imported into the statute by main force. It is not physically possible for the carrier to act instantly, even when a sudden catastrophe, which is bound to affect rates seriously, occurs. It takes time to prepare even a simple petition, and §406(c) of the Act (52 Stat. 998; 49 U. S. C. 486(c)) requires more than a simple petition. "Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable." If the carrier is to comply sincerely with §406(c), it cannot possibly file a petition as soon as an emergency occurs. Especially is that so when the calamity is of uncertain duration, such as a strike or the grounding

* Such a situation has actually developed. On November 1, 1947, all DC-6 airplanes were grounded. *American Aviation Daily*, Nov. 12, 1947, p. 210. United Airlines, Inc. and American Airlines, Inc. were both using DC-6 aircraft and received the same mail rate. United had a rate proceeding pending but American had none. The DC-6 airplanes were gradually restored to service between March 11 and June 1, 1948. On April 7, 1948, the Board proposed to increase United's rate back to January 1, 1948. At the same time it instituted a proceeding involving American, proposing to increase American's mail pay, but only as of April 7, 1948, because no proceeding was pending before then. See Orders Nos. E-1351 and E-1355, Apr. 7, 1948. The proceedings are still pending.

airplanes, so that one can only guess whether its effect l pass rapidly or persist indefinitely.

The situation is only aggravated when the unfairness of rate develops imperceptibly, as it usually does. Then s impossible to detect exactly when the fair rate becomes fair. Even after unfairness is suspected, the carrier y reasonably attribute its losses to other causes. With the advantage of knowledge after the event, the Board's empt to fix the time when the rate became unfair will be y an informed guess. Yet the carrier is now told to sh to the Board with a petition whenever it remotely sus- ts that a rate may be unfair, or risk losing part of its t compensation. It delays at its peril if the Board is werless to grant relief when hindsight shows that the e was unfair before the petition was filed. Thus a emium is put on hasty, ill-considered petitions and a nalty imposed on the prudent carrier which files a peti- n only after events have actually shown that its fears re well-founded.

Actually the Board repeatedly exercised the power to viate such untoward consequences which is now disa- wed. Until the decision below, the Board never denied at it had *power* to make mail rates retroactively effective om any date. The most that it stated was that "as a tter of sound *general* policy there should be no adjust- nts in mail rates during periods when a rate case is not nding" (*Braniff Airways, Inc., Mail Rates for Routes s. 9, 15 and 50*, 3 C. A. B. 633, 636).* It would be idle talk of a "general" policy if the Board lacked power vary it.

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* For other similar "policy" statements see *Transcontinental & stern Air, Inc., Mail Rates*, 4 C. A. B. 139, 142-143; *All American iation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 356-357;

Moreover, time and again the Board both asserted and exercised the power to make rates effective as of a time antedating the institution of a rate proceeding. As the cases are rather lengthy and somewhat technical, they are reviewed in detail in Appendix B hereto. It is significant that, as late as April 18, 1947, the Board's Public Counsel asserted:

> "*Although the Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding,* it has consistently held as a matter of sound general policy that no adjustments should be made in mail rates during periods when rate proceedings are not pending."*

POINT II

The Court of Appeals relied on a non-existent presumption against a retrospective interpretation.

"In the first place," said the Court of Appeals, "we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly

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Pacific Alaska Airways, Inc., Alaska Mail Rates, 6 C. A. B. 61, 70; *Caribbean-Atlantic Airlines, Inc., Mail Rate*, 7 C. A. B. 943, 946. In only two cases did the Board specifically leave open the question whether power existed. *Continental Air Lines, Inc.—Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401; *Mid-Continent Airlines, Inc.—Mail Rates for Routes Nos. 26 and 48*, 3 C. A. B. 464, 466.

* Motion of Public Counsel Burt and Redding to dismiss petition for retroactive rate, *Matter of Mail Compensation of Pennsylvania-Central Airlines Corp.*, Docket No. 484.

When Public Counsel originally moved to dismiss TWA's petition, they did *not* claim that the Board had no power to grant it (13-21). It was two months later, after TWA had cited authorities showing that the Board could not abdicate its power by denying a hearing on the merits (22-25), before Public Counsel amended their motion to contend that no such power existed (38). The claim of lack of power was a sheer afterthought.

specifies such power" (112). The court's citation of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246, shows that it completely misapplied the familiar principle that "unless the contrary plainly appears a statute applies prospectively only" (110 F. [2d], at p. 254).

"Every law that is to have an operation before the making thereof, as to commence at an antecedent time . . . is retrospective" (*Calder* v. *Bull*, 3 Dall. [U. S.] 386, 391). Since "the court will presume that the lawmaking power is acting for the future only and not for the past" (*White* v. *U. S.*, 191 U. S. 545, 552), "laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared" (*Shwab* v. *Doyle*, 258 U. S. 529, 534). That is all the presumption against retroactivity means.

A statute is not interpreted retroactively when—as here—it operates only on situations coming into existence after its passage. Moreover, a "statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment" (*Reynolds* v. *U. S.*, 292 U. S. 443, 449). See also, *Cox* v. *Hart*, 260 U. S. 427, 435; *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 192; *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 571; *U. S.* v. *Jacobs*, 306 U. S. 363, 367. Indeed, the *Neild* case actually applied that very principle (110 F. [2d], at p. 255). Hence there can be no "claim of retroactivity" where a statute involves a "recomputation by the state [Board] of taxes [mail pay] under a statute which was existent throughout the whole period in question" (*Illinois Central Rd. Co.* v. *Minnesota*, 309 U. S. 157, 164). *Cf. U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, 79; *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 328.

POINT III

The Court of Appeals relied on a wholly false analogy to public utility rate statutes.

The court relied heavily on a supposed analogy to public utility rate statutes. "The whole" Act, it thought, "is cast in the form of the usual public utility rate-determination measure. Such measures are frequently made effective as of the date of the inauguration of the proceedings, but never, so far as we know, for periods prior thereto" (114). Therefore the unique language of §406(a)(1), which is found in no public utility rate statute, was cut down to mean something less than it says.

Even if the court's major premise—that §406 of the Act is the "usual utility rate-determination measure"—were correct, its conclusion would not follow. "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom" (*U. S.* v. *Sullivan*, 332 U. S. 689, 693). And there were excellent reasons why Congress did not apply public utility rate principles to airmail pay.

1. Carrying the mail is not a public utility function. That was settled long ago. "The company in carrying the mails was not hauling freight, nor was it acting as a common carrier with corresponding rights and liabilities but in this respect it was serving as an agency of government" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 225 U. S. 640, 649).* That rule reflects vital practical differences

* See also, *U. S.* v. *Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 Fed. 40, 43 (C. C. A. 2); *Bankers' Mutual Casualty Co.* v. *Minneapolis, St. Paul & S. S. M. Ry. Co.*, 117 Fed. 434, 439 (C. C. A. 8); *U. S.* v. *Atlantic Coast Line R. Co.*, 206 Fed. 190, 194; *United Fruit Co.* v. *U. S.*, 33 F. (2d) 664, 666 (C. C. A. 5).

between a mail carrier and a public utility, which are drawn in this very Act.

As a common carrier of passengers and cargo by air, TWA deals directly with the general public—a large, fluctuating group of passengers and shippers. It collects its charges from each customer individually. Every change in its passenger or freight rates directly hits the pocketbooks of its customers. Retroactive increases of those rates is a practical impossibility, just as a retroactive increase of any other public utility rate is not feasible in practice. Customers keep changing and it would be intolerable to make an individual passenger or shipper of freight pay a higher rate years later even though strictly he was charged too little.

Theoretically a court could say that an electric company, for example, was entitled to collect a higher rate from each of ten thousand persons who had already paid their bills, retroactive to some past day. The increase could hardly be put into effect, however, for "consumers of electricity are constantly changing, and . . . additional charges could scarcely be enforced against those who had not enjoyed the lower rate" (*Springfield Gas & Elec. Co.* v. *Barker*, 231 Fed. 331, 335). That is the very reason why enforcement of a utility rate which *prima facie* is confiscatorily low can be temporarily enjoined. "If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted" (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293). See also, *Henderson Water Co.* v. *Corporation Comm. of North Carolina*, 269 U. S. 278, 281.

Because of this practical situation, public utility rates necessarily look to the future. The Act recognizes that

fact. As already seen (pp. 19-20), TWA's air passenger and cargo rates—public utility rates—may be changed only prospectively.

The practical situation is entirely different where mail pay is concerned. As a mail carrier, TWA deals with only one customer—the Government. Compensation for carrying the mail is paid by the Post Office, not by every man who buys an airmail stamp. Changes in mail pay do not directly impinge on any one individual. The Government, as sole customer, never changes its identity; it is always available to bear the cost of retroactive increases, or receive the benefit of retroactive decreases, of mail rates. Retroactive adjustment is practically feasible; as noted above (pp. 17-18), it has frequently been made.

Hence mail pay has never been controlled by the rules peculiar to public utility rates. *U. S. v. Griffin*, 303 U. S. 226, 237-238. Since the reason underlying the traditional public utility rule is inapplicable to mail pay, it is hardly surprising that §406(a)(1) of the Act does not embody that rule, but permits mail pay rates to be changed "effective from such date as" the Board "shall determine to be proper."

The difference in treatment was pointed out on May 1, 1947, by a member of the Board when testifying before the Subcommittee of the Senate Committee on Appropriations, 80th Cong., 1st Session, on H. R. 2436 (Hearings, p. 574):

> "Mr. Ryan. When we fix passengers and cargo rates, those rates are prospective in their operation. They do not relate back.
>
> "Now, of course you can understand the practical reasons for that. Passengers are scattered all over, and their identity is lost.

"Senator Saltonstall. You have only one mail customer.

"Mr. Ryan. That is right. There is just the Postmaster General, and if he overpays as a result of one of our decisions, he will not pay the following year and even up."

2. Moreover, it is quite incorrect to suppose that, where mail pay is concerned, the Act is a traditional regulatory public utility statute. "It must not be forgotten that the Civil Aeronautics Act is fashioned to a developmental as well as a regulatory objective. Nowhere is this fact made clearer than in those provisions which set forth the standards for the Board's guidance in the exercise of its air mail rate-making function" (*Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 563). "Certainly, the declaration of policy contained in section 2 differentiates the Act in many important respects from the usual form of public utility regulatory statutes" (*American Export Airlines, Inc.—Certificate of Public Convenience and Necessity*, 2 C. A. B. 16, 30; appeal dismissed *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 121 F. [2d] 810 [C. C. A. 2]).

Under the Act, mail pay is not determined by "public utility" principles. "This Board in exercising its rate-making functions has never and does not now measure the reasonableness of the rate in terms of a fair return upon the so-called 'fair value' of the property used and useful in the public service" (*American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 788). Section 406(b) prescribes strikingly unique standards for determining mail pay. "In determining the rate in each case, the Board shall take into consideration, among other factors . . . the need of

each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, *to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense*" (52 Stat. 998, 49 U. S. C. §486(b)).*

"Section 406(b), more than any other section of the Civil Aeronautics Act, discloses the basic difference between the dual developmental and regulatory objective of this Act and the regulatory objective of the ordinary statute designed for the control of public utility rates" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 335). Actually mail pay is "Government subsidy in the form of mail pay" (Annual Report of the Civil Aeronautics Board, 1947, p. 5). "The use of mail payments is a statutory device for the accomplishment of statutory objectives that transcend the interests of the postal service . . . The 'compensation' which the carrier receives thus becomes compensation not only for carrying the mail but for the building up of a system of air transportation which will serve the nation's commerce and security as well" (*American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 335).

"Thus section 406(b) of the Act departs from the customary rate standards" (*American President Lines, Ltd., et al. Petition*, 7 C. A. B. 799, 802 note 9), and the Board's mail pay task differs "fundamentally from that which faces

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* *Cf.* the much more conventional factors which the Board must consider in setting rates for the common carriage of persons and property. §1002(e); 52 Stat. 1019, 49 U. S. C. §642(e).

the public regulatory body in the fixing of rates for the transportation of passengers and property or in fixing the rates for public utility services" (*Pan American Airways Co. [of Delaware]—Mail Rates*, 1 C. A. A. 220, 252-253). See too, *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 755. That was made clear in the Board's first mail pay case, *Mid-Continent Airlines, Inc., Mail Rates*, 1 C. A. A. 45 (pp. 54-55):

> "The above factors which the [Board] is directed to take into consideration in fixing and determining fair and reasonable rates under the act, *differ from the tests which*, under the influence of judicial decision during the past 40 years, *have been set up for the guidance of public regulatory bodies in fixing rates for public utilities and common carriers*. . . . Sections 2 and 406, as well as other sections of the Civil Aeronautics Act, disclose the clear intent of Congress that the problems of civil aviation require special treatment."

Since the "problems of civil aviation require special treatment" §406(a)(1) uses special language which does not appear in any other statute. It is doubly fallacious, therefore, to try to define the retroactive power to change mail rates by analogy to public utility rate cases. That fallacy, exposed by the Interstate Commerce Commission long ago (*Air Mail Compensation*, 222 I. C. C. 602, 603), was riddled by the Board when it rejected an argument that, because a case had held that public utility rates could not be reduced retroactively, it could not reduce mail pay retroactively. It said, *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323 (pp. 330-331):

> "*Unlike that case, the instant proceeding does not involve a relationship between a private shipper and*

a common carrier. If it did, then the carrier's argument that the Board may 'retroactively' increase rates apparently has no force in view of the principle that a private shipper, once having paid a published rate, need not concern himself with subsequently having to pay more. On the contrary, *the Postmaster General, unlike the private shipper, is the medium through which continuous financial support necessary for the carriers to fulfill the purposes of the Act is extended. Our obligation is to see to it that the rates he pays are at all times sufficient to enable the carriers to accomplish and maintain those purposes.* Likewise, our obligation is also to see that the rates do not at any time exceed those which are proper under the statute. We must discharge both obligations."

3. The court was led to espouse the false analogy to "public utility" rate cases by its assumption that the only alternative was a "cost-plus" payment in which "the net to the contractor is the same no matter what the quality of the performance may be" (114). "We cannot find in this statute," said the court, "any language which indicates that Congress intended to guarantee to every carrier a profit" (114).

No one claims that Congress intended to "guarantee to every carrier a profit" regardless of the "quality of the performance." As the Board can, must and always does review costs, and is ever alert to allow only reasonable costs in the light of actual experience, this bugaboo is simply imaginary.*

* Section 406(b) refers to the carrier's need for compensation to enable it to carry out the purposes of the Act "under honest, economical, and efficient management".

The Board itself has pointed out several times that the "cost-plus" argument affords no reason for adhering doggedly to a false prophecy when events have proved it wrong. "Although it is not the Board's intention, in rate proceedings involving the fixing of mail rates for past periods, to determine mail rates merely on a cost-plus basis, it must be recognized that the process of fixing rates for a past period" on a retroactive basis "does assure the air carrier substantial protection against unforeseeable contingencies for which a prospective fair and reasonable rate might well have made inadequate allowance" (*Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 291, note 22).* Certainly Congress was amply justified in accepting that view, whether the Board now likes it or not.

In point of fact, whenever the Board raises rates retroactively to the date when the proceeding was begun, necessarily it reviews the airline's actual costs and determines the rate in the light of experience. Indeed, since the airline must receive "just compensation," the Constitution requires that to be done. *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73. Likewise, when the Board fixes "temporary"

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* See also, *Pan American Airways, Inc., Latin-American and Miami-Leopoldville Services Mail Rates*, Order No. E-738, p. 47 (July 24, 1947); *Alaska Airlines, Inc.*, Order No. E-1665, pp. 40-41 (June 4, 1948). "It has been the practice to provide a somewhat lower rate of return for a past period than for a future period in view of the fact that for a past period the probability of error in estimates of operating results is removed and other operating risks have been realized in substantial part" (*Braniff Airways, Inc.*, Order No. E-1931, p. 29, Sept. 2, 1948). See also, *Chicago & Southern Airlines, Inc.*, Order No. E-1740, p. 29 (July 1, 1948); *Delta Air Lines, Inc.*, Order No. E-1959, p. 20 (Sept. 7, 1948).

rates; as it frequently does, it follows the same procedure when it revises them retroactively.*

4. In short, the dilemma which the court posed is simply non-existent. Its analogy to public utility rate statutes ignores the practical reasons which explain why the Act deliberately differentiates between the Board's power to change public utility rates prospectively and its power to change mail pay rate retrospectively as well as prospectively. It ignores the fact that the air mail provisions of the Act deliberately departed from traditional public utility rate principles. And it ignores the admonition of *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, where, after noting that all forms of transportation had "common features," this Court said (pp. 107-108):

> "But these resemblances must not blind us to the fact that legally as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. . . . However

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* At one time, indeed, the Board declined to set rates on a "tentative basis, subject to change according to future operating results" because that "would, in effect, result in the establishment of a 'cost-plus' system of rate making" (*All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 357). It has long since abandoned that position, and fixes "temporary" rates, which will be revised retroactively, both when dealing with new routes (see, *e.g., Essair, Inc., Temporary Mail Rates*, 6 C. A. B. 687, 690-691; *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 423; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 618) and routes on which "permanent" rates were previously effective (see, *e.g., Pennsylvania-Central Airlines Corp.*, Order No. E-436, April 7, 1947, p. 7; *Chicago & Southern Air Lines, Inc.*, Order No. E-510, May 6, 1947, p. 7; *National Airlines, Inc.*, Order No. E-1271, March 5, 1948, pp. 5-6).

useful parallels with older forms of transit may be in adjudicating private rights, *we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.*"

POINT IV

The Act deliberately removed whatever restrictions may have existed under earlier Mail Pay Statutes.

The court also thought that §406(a)(b) "appears to have been designed to establish in the Board the same powers which had theretofore existed at the Interstate Commerce Commission in respect to railway mail" and it "had never been claimed that the Interstate Commerce Commission had unfettered retroactive power" (113). It found justification for whittling down the Act in the "limited legislative purpose" which it thought was "apparent from the history" (113).

Actually the broad language of §406(a)(1) was designed to remove any limitations on power to adjust mail pay rates under earlier, restrictive statutes. That it was intended to confer plenary authority in this respect is made plain by the only expression of Congress on the point, which appears in the Conference Report on the final bill (H. Rep. No. 2635, 75th Cong., 3d Sess., June 7, 1938).* There it was stated (pp. 71-72):

> "*This section* empowers the Authority [Board] to fix mail rates and sets forth the congressional

* This same report was made to and adopted by the Senate on June 13, 1938; see 83 Cong. Rec. 8961-8963.

> policy to guide the Authority [Board] in fixing such rates and *enables the Authority* [Board] *to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier or class of carriers according to the needs of the particular case*. . . . These provisions appear in the conference agreement as section 406(a), (b) and (c)."

Yet the decision below holds that, even though "the needs of the particular case" require that the Board "adjust rates" retrospectively, in order for the airline to carry out "the policy of Congress," the Board is powerless to achieve that beneficent result.

A. The Railway Mail Pay Act of 1916

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business" (*Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 353). This warning is especially pertinent when comparing the Civil Aeronautics Act with the Railway Mail Pay Act of 1916 (Act of July 28, 1916, c. 261; 39 Stat. 425 ff., 39 U. S. C. §524 ff.), and the Air Mail Acts of 1934 and 1935 (Act of June 12, 1934, c. 466; 48 Stat. 933, amended by Act of August 14, 1935, c. 530; 49 Stat. 614), modelled on it. A detailed comparison of the statutes appears in Appendix A hereto.

"The Railway Mail Pay Act terminated the system theretofore prevailing of service under voluntary contracts" (*U. S.* v. *Griffin*, 303 U. S. 226, 229). Under it the railroads were "entitled to receive fair and reasonable compensation" (39 U. S. C. §541). This compensation was fixed purely on a *quantum meruit* basis. *U. S.* v. *Griffin*, 303 U. S. 226, 237. [Under the Civil Aeronautics Act, air-

lines are not paid for transporting mail on any such restrictive basis.]

Railroad mail rates were fixed by the Interstate Commerce Commission. Once fixed, they remain in effect until changed. The Commission was "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter . . . and to publish the same, and *orders so made and published shall continue in force until changed by the Commission* after due notice and hearing" (39 U. S. C. §542). [The difference between this language and §406(a)(1) of the Civil Aeronautics Act is obvious.] There was no provision for a judicial review; the statute permitted only "administrative review by 'reexamination' of an order" (*U. S. v. Griffin*, 303 U. S. 226, 231). [The Civil Aeronautics Act contains in §1006(a), 49 U. S. C. §646(a), an express provision for judicial review.]

An order could not be reexamined until it had remained in effect six months. "Either the Postmaster General or any such carrier may at any time *after the lapse of six months from the entry of the order assailed apply for a reexamination* and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said applications . . ." (39 U. S. C. §553). [No comparable provision appears in the Civil Aeronautics Act.]

Plainly reexamination was to be purely prospective. In view of the highly restrictive language of the Railway Mail Pay Act, it would hardly be surprising if no power ever existed thereunder to increase mail pay retroactively. Yet this Court held that power to increase the rate retroactively to the date of the petition for reexamination existed

y "reasonable implication," although it was "quite aware hat minutiae of expression may be found that show Congress to have been thinking of the future" (Holmes, J., in *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, 79).* "This onclusion was reached despite the fact that the applicable tatute contained no express authority, such as is contained n section 406(a) of the Civil Aeronautics Act, to determine he date on which rate orders should become effective" *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 23, 326-327).

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* No issue existed in the *New York Central* case whether mail ay could be increased to a date earlier than the application for reexamination; the court "assumed" that "while the railroads perform hese services and accept pay without protest they get no ground for ubsequent complaint" (p. 78). The problem actually arose in *Macon, Dublin & Savannah Rd. Co.* v. *U. S.*, 78 C. Cl. 251. There he Commission found that plaintiff and other short-line railroads, hich filed petitions for reexamination in May *1931*, were actually separately operated" as of July 3, *1930*, but it refused to award additional compensation for services rendered prior to the filing f their applications with us" (*Railway Mail Pay*, 185 I. C. C. 715, 20). Plaintiff sued in the Court of Claims for the additional pay rom July 3, 1930, to May 1931. A demurrer to its complaint was verruled. "Congress reposed in the Commission the primary duty f determining just compensation, not whether by some act on the art of the carrier it was estopped as a matter of law from receiving ust compensation in its entirety" (78 C. Cl., at p. 256). The period f underpayment without protest was not "so protracted as to estabsh, affirmatively, with all the other circumstances, including the fact hat plaintiff was not free to decline performance, the defense of cquiescence" (p. 258). Final judgment was later given for plainff, 79 C. Cl. 298. While the case primarily involved the question hether plaintiff was entitled to one previously determined rate rather han another, it shows that under the Railway Mail Pay Act—despite s severely restrictive language—it was possible for a railroad to btain an increase in mail pay retroactive to a time antedating its etition for reexamination.

B. The Air Mail Act of 1934

This statute was even more restrictive than the Railway Mail Pay Act on which it was based. Airlines were not compelled by law to carry mail. They assumed that obligation only by making contracts with the Postmaster General (§3(a), 48 Stat. 933-934), which could be terminated "by the contractor at its option upon sixty days' notice" (§6(c), 48 Stat. 935). The rates were negotiated by the contracts, which were let by competitive bidding, subject to a specified ceiling (§3(a), 48 Stat. 934). Contracts were to be "subject to any *reduction* in the rate of payment therefor" (§6(c), 48 Stat. 935).

The Commission was authorized to fix by order "rates of compensation for the transportation of air mail by airplane . . . but not in excess of the rates provided for in this Act . . . and to publish the same, *which shall continue in force until changed by the said Commission* after due notice and hearing" (§6(a), 48 Stat. 935). The limited procedure under the Railway Mail Pay Act for reexamination of a rate after six months was taken over by a section making applicable the whole procedure "for the adjustment of rates for carriage of mail by railroads" (§6(d), 48 Stat. 935). In fact, a special requirement was imposed that rates be reviewed annually "in order to be assured that no unreasonable profit is resulting or accruing" (§6(b), 48 Stat. 935).

Thus Congress' whole effort was to keep air mail pay as low as possible.* Indeed, it took elaborate reasoning

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* Mail pay was determined only by "the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources" (§6(e), 48 Stat. 936). This provision was amended in 1935 to require the Commission to disregard losses resulting from the unprofitable maintenance of non-mail schedules

to establish that the Commission had *any* power to increase the contract rates. *Air-Mail Compensation*, 206 I. C. C. 675, 688-694. Yet despite the statute's manifold restrictions the Commission repeatedly held that it could increase air mail rates retroactively to the date of the application for reexamination.*

In two cases, airlines sought to have rate increases made effective earlier than the time of their applications for adjustment. The requests were denied, but on the merits, not for lack of power.** In one case, however, the Commission

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(49 Stat. 616). The Commission was directed to "keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom" (§6(e), 48 Stat. 936).

* Commissioner Mahaffie dissented because he thought that the rule to this effect under the Railway Mail Pay Act was inapplicable since airlines, unlike railroads, were not obliged to carry the mail. *Air Mail Compensation*, 216 I. C. C. 166, 192; *Air Mail Compensation*, 222 I. C. C. 602, 610; *Air Mail Rates for American Airlines, Inc.*, 225 I. C. C. 12, 46; *Air Mail Rates for Braniff Airways, Inc.*, 226 I. C. C. 752, 768; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 516; *Air Mail Rates for Route No. 26*, 229 I. C. C. 373, 383; *Air Mail Rates for Route No. 29*, 229 I. C. C. 623, 632; *Air Mail Rates for Route No. 2*, 231 I. C. C. 229, 250; *Air Mail Rates for Route No. 13*, 231 I. C. C. 673, 683.

** "As previously stated, petitioner seeks to have the findings herein made effective from May 1, 1936, prior to the date its petition was filed. In *Air-Mail Compensation*, 216 I. C. C. 166, the rates found fair and reasonable for routes nos. 3 and 16 were, for the reasons there stated, made applicable from the date of filing of the petition. *This record affords no basis for any different conclusion*, especially, in view of the fact that the relief sought will, in part at least, be obtained through the proper application of the order in *Air Mail Compensation, supra*, during the period prior to the date of filing the petition" (*National Parks Airways—Base Rate Mileage*, 220 I. C. C. 149, 154).

". . . there is no indication *on this record* that any modification of the base rate formerly determined and fixed as fair and reasonable is warranted" (*Boston-Maine Airways, Inc., Base Rate Mileage*, 229 I. C. C. 343, 350).

actually made such a retroactive increase on its own motion.* Moreover, rates were decreased retroactively to a day antedating the rate review proceeding.**

C. The Changes Made by the Civil Aeronautics Act

The Civil Aeronautics Act of 1938 completely revolutionized the status of the airlines and the nature of mail pay. Congress recognized that air carriers subserved national interests of far greater importance than cheap postal service, and that air mail pay was a means of developing an infant industry to effectuate those interests. Hence in §2 Congress enunciated a "new national policy" to foster "the continued development of an air transportation system adequate to the paramount national needs, not only of the postal service but also of our commerce and our national

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*In *Air Mail Compensation*, 232 I. C. C. 608, the Commission eliminated on its own motion a proviso in an earlier order, made two years before, which had reduced air mail pay retroactively. Elimination of the proviso necessarily increased the airlines' compensation retroactively. "We have authority on our own motion to correct an error in our former findings and to make such finding in the form of an amendment to our original findings and order", (p. 613). In *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, 401-402, the Commission made an initial rate retroactive to March 1, 1935, although the rate proceeding was begun thereafter. It did so because of the August 1935 amendment, *supra*, page 38, note *.

**The Commission consistently reviewed operations for periods antedating the proceeding for revision. See, *e.g.*, *Wyoming Air Service, Inc., Rate Review*, 225 I. C. C. 1; *Western Air Express Corp., Rate Review*, 225 I. C. C. 743; *National Airways, Inc., Rate Review*, 226 I. C. C. 409; *Hanford Airlines, Inc.*, 227 I. C. C. 593. In only two cases, however, did it actually lower previous rates. In both of them the decrease was adjusted by the Postmaster General retroactively to March 1, 1935, although the changes were made by proceedings started thereafter. The cases are described in *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12.

defense" (*Chicago & Southern Air Lines, Inc.—Mail Rates for Routes Nos. 8 and 53*, 3 C. A. B. 161, 191).

No longer were airlines free to carry mail or not as they saw fit. They were compelled to carry the mails, §401(m) (52 Stat. 990, 49 U. S. C. §481(m)); 902(a) (52 Stat. 1015, 49 U. S. C. §622(a)), and necessarily were afforded just compensation as a matter of right. §§401(m) and 406(a).

Provisions designed to hold mail pay as low as possible, so that it would not exceed postal revenue, disappeared. The voluntary contract system—under which airlines would bid nominal rates in order to obtain certificates to operate*—was abolished. Ceilings on maximum rates were eliminated. Mail pay was not to be computed on a narrow *quantum meruit* basis, but was to be ample enough to enable the airlines to "maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense" (§406(b)). The mail provisions of the Act "enacted the policy of governmental financial aid to the air lines."**

Likewise the "rate making" procedure under the earlier acts was completely overhauled. Congress struck out the provision that rates remained in effect until changed. It dropped the requirement that six months had to elapse before mail rates could be "reexamined." The newly-created Board was "empowered" to adjust rates at all times, §406(a).

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* See, *e.g.*, *Transcontinental & Western Air Mail Bid*, 223 I. C. C. 281, involving a bid to carry mail at 4 *mills* per airplane mile.

** *Survival in the Air Age*, Report of the President's Air Policy Commission, Jan. 1, 1948, p. 100.

Nor was Congress content to leave the "development of air transportation" to the voluntary action of the airlines. The Board was not to be a passive umpire between the Post Office and the airlines, sitting with folded hands until it was petitioned to act. Congress did not allow the Board "to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief" (87). By §406(a)(1) Congress not only "empowered" but "directed" the Board to take action "upon its own initiative." It placed on the Board the independent responsibility of effectuating its purposes, stated in §2 and §406(b), whether the carrier acted or not. "Our *obligation* is to see to it that the rates he [the Postmaster General] pays are *at all times* sufficient to enable the carriers to accomplish and maintain those purposes" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 330). By the same token, it gave the Board full power to effectuate those purposes when the carrier did act.

Congress swept away whatever restrictions may have existed under earlier laws to hamper the retroactive increasing of mail pay. Limitations on the power to make retroactive rate increases might be appropriate in statutes primarily concerned with keeping the cost of postal operations low. They would only defeat the broad national objectives of the new Act. ". . . when Congress wants to give wide discretion it uses broad language" (*Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 616). In §406(a)(1) it conferred the widest discretion by using the broadest possible words. The Board was "empowered and directed . . . to make such rates effective from such date as it shall determine to be proper."

D. The "Legislative History" of Section 406(a)(1)

The only valid legislative history of Section 406(a)(1) is contained in the Conference Report issued 16 days before the Act was approved.* The "make effective" language of 406(a)(1) was suggested in 1937 during hearings on a bill which was not enacted into law. The witness who proposed it, Mr. Gorrell, representing the Air Transport Association, told a Senate subcommittee: "the present authority of the Commission to fix appropriately the effective date of its rate decisions is . . . specifically preserved."** This sentence was relied on by the Board (74-76) and the court below (113) as proof that the Act should be construed to permit retroactive increases only to the date of the filing of a rate application. The contention is groundless.

The major issue at the time was whether air transportation should be regulated by the Post Office, the Interstate Commerce Commission or an entirely new agency. Under the Air Mail Acts, both the Post Office and the Commission had "authority over the compensation to be paid for the transportation of air mail."*** The Department of Commerce had jurisdiction over safety matters. It was generally agreed that one body should have control of the industry, but there was no agreement on the identity of that agency. The bill under consideration in 1937 would have reposed control in the Commission, and modified then existing law in a great many other respects.

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* See pp. 31-35 *supra*.

** Hearings before the Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st Sess., p. 325. This document is referred to hereafter as "Subcommittee Hearings." See also Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652, 75th Cong., 1st Sess., p. 408.

*** *Subcommittee Hearings*, pp. 40, 42.

The Post Office Department felt that control should rest largely with it.* Therefore it and its champion, Senator McKellar, vigorously opposed the proposed bill, and proceeded to attack the Commission's administration of existing law on a wide front.** In the course of the ensuing argument, the question arose whether the Commission was justified under the existing Air Mail Acts in granting any retroactive rate increases.

On that subject, there had been some difference of opinion in the Commission. Commissioner Mahaffie had held out against retrospective increases, differentiating the rule under the Railway Mail Pay Act on the ground that, unlike that statute, the Air Mail Acts imposed no obligation to carry the mails. His views never prevailed in the Commission and the Post Office never tried to sustain them by a court test.*** Nonetheless, they were aired by the Post

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* *Ibid.*, pp. 107 ff.

** For example, the Commission was charged with being too liberal in increasing air mail pay, and too reluctant to reduce it (*ibid.*, pp. 116, 122, 160-161). A list was submitted showing that rates had been raised on most routes, and decreased or left unchanged on relatively few (pp. 129-135); it showed that in a proceeding instituted on July 22, 1935, the Commission "increased the bid rate . . . retroactively to March 1, 1935" (p. 130). So also, the Commission was charged with not making a proper investigation and audit before increasing rates and not disclosing the evidence on which it based its findings (*ibid.*, pp. 163, 172-174), of employing a man "unduly friendly to the air-mail companies" (p. 167), and of differentiating unduly between the "subsidy" rates given to competing airlines (pp. 169-170).

*** The Act, like the bill which was the subject of discussion in 1937, completely cut the ground from under Mr. Mahaffie's argument, for it imposed on airlines the duty to carry the mails. Even if the "make effective" language of §406(a)(1) had never been added, therefore, unquestionably the Board would have had at least the same power in this respect which the Commission in fact exercised in 1937.

Office in response to questions by Senator McKellar. "On what possible theory or what possible claim of law," he inquired, "were retroactive rates established?"* He elicited testimony from a witness sharing his views that increases were granted retroactively "even further than the application."** Repeatedly he tried to show that the Commission had no "right to make their acts retroactive in fixing rates."***

The proponent of the bill, Senator McCarran, countered this broad attack. He endeavored to show that this court had sustained "retroactive rate decisions."**** 'In other words, that establishes the principle of the propriety of a retroactive decision."***** Testimony was elicited to show that Congress itself had authorized rates to be made retroactive to March 1, 1935.****** Later Mr. Gorrell discussed at length "the power of the Interstate Commerce Commission to make a retroactive award" and vigorously contended that it existed.*******

Manifestly, when Mr. Gorrell said, in proposing the "make effective" language which now appears in §406(a)-(1), that the "present authority of the Commission to fix appropriately the effective date of its rate decisions is like-

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* Hearings, p. 179.

** *Ibid.* He brought out that the Commission went back to "different dates. The first date the payments were adjusted was to March 1, 1935, I believe. In the last case they were fixed back to the date of the filing of the petition."

*** *Ibid.*, pp. 239, 291.

**** *Ibid.*, p. 180.

***** *Ibid.*, p. 343.

****** *Ibid.*, p. 230.

******* *Ibid.*, pp. 483-484.

wise specifically preserved," he was addressing himself to the broad question raised by Senator McKellar—did the Commission have *any* authority to grant retrospective increases? The whole debate was over the "principle of the propriety of a retroactive decision." There is not the slightest reason to suppose that Mr. Gorrell thought that authority to "fix *appropriately* the effective date of its rate decisions" was limited by the date of the start of the rate proceeding.* Neither he nor anyone else addressed himself to that narrower question.**

Nor is there anything to show that Congress, when it passed the Act in the summer of 1938, saw in § 406(a)(1) those subtle nuances now attributed to Mr. Gorrell when he testified in the spring of 1937. It took the language at its broad face value. (See Conference Report, *supra*, pp. 34-35.) "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction" (*Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260). No member of Congress ever referred to Gorrell's testimony. "The interpretation of statutes cannot safely

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* As already seen, p. 39, note **, and p. 40, notes * and **, *supra*, rates had been changed retrospectively back of the date of the proceeding, and that fact had been developed in the hearings.

** *Cf. American Stevedores, Inc.* v. *Porello*, 330 U. S. 446. There the question was whether a statute permitted suit for personal injuries as well as injury to property. The Representative proposing the bill stated that it "simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged" and that "where a man's property is damaged, he can bring a suit." He said nothing about suits for personal injuries. This Court disregarded these remarks. "These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions" (p. 452).

be made to rest upon mute intermediate legislative maneuvers" (*Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61).

Had Congress wished to codify such power as existed under the Railway Mail Pay Act, it had only to copy its words and impose on airlines, like the railroads, the obligation to carry the mails. Instead it changed the words of the earlier acts radically by patently broader language. If it had wanted to confine the Board's power to adjust mail pay by the filing date of the rate proceeding, all it had to do was to copy the language used in other parts of the Act (*supra*, pp. 19-20). It did nothing of the sort.

The legislative history of the Act only confirms the fact that §406(a)(1) means just what it says. Congress deliberately departed from the wording of earlier, restrictive legislation. Drawing a unique statute, it used in §406(a)(1) unique language of a breadth consonant with its broad purpose to foster the development of commercial aviation "until it reaches such stature in passenger and cargo capacity as to constitute in crises an adequate logistical air arm of the National Defense Establishment" (*Report of the Congressional Aviation Policy Board*, p. 5—March 1, 1948). That language should not be whittled down by a construction which ignores these objectives.

POINT V

The decision below thwarts the basic policies of the Act and defeats the airlines' constitutional right to just compensation.

1. The court below was largely influenced by the "result which would ensue if the statute were given unlimited retroactive effect" (114). "No rate order would be final"

(114). But no one suggests that the Board should examine rates "back to 1938" (81), or that it is required to re-examine rates based on facts which it has once reviewed. It does have full power to examine rates based on prophecies which have been belied by facts which have never been reviewed.

That power, the court thought, necessarily implied the power to redetermine rates for past periods "when the carrier has made more than an adequate profit" (114). There is nothing inevitable about that implication. It is one thing to give an airline a fair amount for past services rendered at a rate which events have proved unduly low. It is utterly different to subject it to liability to return money which it has disbursed by a "dividend declaration," or on the faith of which it has entered into a "large commitment" or issued an "offering of securities" or otherwise changed its position (115).

Because of compelling economic and policy considerations, the Board has declined to exercise retroactive power with respect to overpayments. *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 565; *Pan American Airways, Inc., et al., Latin-American Rate Case*, 3 C. A. B. 657, 669; *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 743; *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 776. The *power* is not rendered nonexistent, however, because conceivably it might be abused—in which case doubtless the Board's action would be reversed on appeal. And we see no compelling reason to deny that the Board has power in appropriate cases to declare that excessive amounts have been paid for carrying

the mails, however rarely it should exercise that power as a matter of sound discretion.*

2. The Board's basic complaint was that "until a petition is filed by the carrier we have no notice that an existing rate is regarded as unsatisfactory, and we thus have no opportunity to take" appropriate action (87). Apart from the fact that the Board is directed to act on its own initiative, lack of notice would be no reason for denying that power exists to take complete remedial action when the situation *is* called to the Board's notice. Besides, there are compelling constitutional and statutory reasons why §406(a)(1) should not be vitiated by any such considerations of administrative convenience.

(a) "Rules of comity or convenience must give way to constitutional rights" (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293). Section 406(a)(1) was not enacted to serve the Board's convenience. It was essential to save the Act from unconstitutionality. As the airlines were compelled to carry the mails, of course they were entitled to just compensation.**

The Board says that "a rate is constitutionally adequate if it affords a carrier an *opportunity* to earn a fair return"

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* Historically the Government has been able to recover past over-payments of mail pay, no matter "how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred" (*Grand Trunk Western Ry. Co.* v. *U. S.*, 252 U. S. 112, 121). See also, *U. S.* v. *Carr*, 122 U. S. 644; *Wisconsin Central Rd. Co.* v. *U. S.*, 164 U. S. 190.

** The opinion below states that only the question of power was raised below (112). That is incorrect; the question of constitutionality was also raised in both TWA's main and reply briefs.

(88).* That is true only when the rate is initially set—when it is in the prophecy stage. When it ceases to be adequate in fact, it ceases to be constitutionally adequate, as *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, shows.

A confiscatory rate does not cease to be confiscatory because it takes time for the Board, or the airline affected, fully to appreciate the fact. Indeed, we have already seen (pp. 21-22) that it is impossible for an airline to file its petition immediately even when it knows the facts. Hence, unless the Board has the power claimed, a part of the airlines' constitutional rights is left unprotected. Plainly such an interpretation of the Act should not be reached. *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.**

(b) The purposes of the Act, moreover, transcend considerations of administrative convenience. Congress imposed on the Board the "obligation . . . to see to it that the rates" paid by the Postmaster General "are *at all times* sufficient to enable the carriers to accomplish and

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* The Board relied on public utility cases (69-70). In theory exactly the same principle applies to public utility rates. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. Manifestly, however, it would be unjust to impose the burden of past losses on those future customers of the utility who did not receive the benefit of the unduly low past rates. And, as already seen, for practical reasons public utility rates cannot be retroactively increased when experience proves them to be inadequate. Hence there is no way to effect such a retroactive increase in the case of public utilities. "The Constitution as a continuously operating charter of government does not demand the impossible or the impractical" (*Hirabayashi* v. *U. S.*, 320 U. S. 81, 104; *Bowles* v. *Willingham*, 321 U. S. 503, 515).

** Undoubtedly constitutional rights can be waived. But failure to file a petition for an increase in rates is not a waiver as a matter of law. See *Macon, Dublin & Savannah Rd. Co.* v. *U. S.*, 78 C. Cl. 254, *supra*, p. 37, note *; *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948).

maintain those purposes" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 330). It regarded the fostering of a strong commercial aviation industry as vital to national defense and polity. Mail pay was the device used by the airlines in fulfilling that purpose.

A carrier cannot properly attain that legislative goal when its financial strength has been impaired because events have belied the Board's rate prophecies. The Board must be able to afford the full relief needed to make good the impairment. We submit that the Act confers on the Board full power to effectuate the purposes of Congress, and that the result below flies in the face of the clear words of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y., October 29, 1948.

APPENDIX A

Relevant Statutory Provisions

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 977, 49 U. S. C. §§ 401-691
	Declaration of Policy	
None	None	DECLARATION OF POLICY Sec. 2 (52 Stat. 980, 49 U. S. C. §402) In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity— (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Carrier's Statutory Duty to Carry Mail

Sec. 5, subd. 27 (39 Stat. 429, 39 U. S. C. §541) All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.	None	REQUIREMENT AS TO CARRIAGE OF MAIL Sec. 401(m) (52 Stat. 999, 49 U. S. C. §481 (m)) Whenever so authorized by the certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Sec. 5, subd. 33 (39 Stat. 431, 39 U. S. C. §563) It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General to do so, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.

APPLICATION FOR ABANDONMENT

Sec. 401(k) (52 Stat. 990, 49 U. S. C. §481(k)) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

TENDER OF MAIL

Sec. 405(g) (52 Stat. 995, 49 U. S. C. §485(g)) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder

thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

SAFETY AND POSTAL OFFENSES

SEC. 901(a) (52 Stat. 1015, 49 U. S. C. 621 (a)) Any person who violates (1) any provision of titles V, VI, and VII of this Act, or any provision of subsection (a) (1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to

CRIMINAL PENALTIES—GENERAL

SEC. 902(a) (52 Stat. 1015, 49 U. S. C. §622(a)) Any person who knowingly and willfully violates any provision of this Act (except titles V, VI, and VII), or any order, rule, or regulation issued under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first

of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

CRIMINAL PENALTIES—GENERAL

Sec. 902(a). (52 Stat. 1015, 49 U. S. C. §622(a)) Any person who knowingly and willfully violates any provision of this Act (except titles V, VI, and VII), or any order, rule, or regulation issued under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

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Authorization to Award Mail Contracts

Sec. 5, subd. 10 (39 Stat. 427, 39 U. S. C. §565). The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special

Sec. 3(a) (48 Stat. 933) The Postmaster General is authorized to award contracts for the transportation of air mail by airplane between such points as he may designate, and for initial periods of not exceeding one year,* to the lowest

[No authorization to award new contracts except "in the event of emergency caused by flood, fire or other calamitous visitation." Sec. 405(k) (52 Stat. 997, 49 U. S. C. §485(k)).]

* Words "one year" changed to "three years" by amendment of August 14, 1935 (49 Stat. 616).

contracts are made and the terms and reasons therefor.

responsible bidders tendering sufficient guaranty for faithful performance in accordance with the terms of the advertisement at fixed rates per airplane-mile: *Provided*, That where the Postmaster General holds that a low bidder is not responsible or qualified under this Act, such bidder shall have the right to appeal to the Comptroller General who shall speedily determine the issue, and his decision shall be final: *Provided further*, That the base rate of pay which may be bid and accepted in awarding such contracts shall in no case exceed 33-1/3 cents per airplane-mile for transporting a mail load not exceeding three hundred pounds. Payment for transportation shall be at the base rate fixed in the contract for the first three hundred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane-mile.

Sec. 3(g) (48 Stat. 934) Author-

Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act

	the contract for the first three hundred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane-mile.	
	Sec. 3(g) (48 Stat. 934) Authority is hereby conferred upon the Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act nor that provided for in the original contract: *Provided*: that no such contract may be so extended unless the contractor shall agree in writing to comply with all the provisions of this Act during the extended period of the contract.	
	Termination of Mail Contracts	
None	Sec. 6(c) (48 Stat. 935) Any contract which may hereafter be let or extended pursuant to the provisions of this Act, and which has been satisfactorily performed by the contractor during its initial or extended period, shall thereafter be continued in effect for an indefinite period, subject to any reduction in the rate of payment therefor, and such additional conditions and terms, as the [Interstate Com-	None.[Contracts entered into under the Air Mail Act canceled upon the issuance of a certificate of convenience and necessity authorizing mail transportation. Sec. 405 (52 Stat. 994, 49 U. S. C. §485(a)).]

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation; and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

Sec. 5, subd. 30(g) (39 Stat. 430, 39 U. S. C. 551) At the conclusion of the hearing the Commission shall establish by order a fair, reasonable

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

merce] Commission may prescribe, which shall be consistent with the requirements of this Act; but any contract so continued in effect may be terminated by the said Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated by the contractor at its option upon sixty days' notice. On the termination of any air-mail contract, in accordance with any of the provisions of this Act, the Postmaster General may let a new contract for air-mail service over the route affected, as authorized in this Act.

Power to Fix Rates From an Effective Date

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by aircraft and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, [and so much of subsection

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

AUTHORITY TO FIX RATES

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transporta-

Power to Fix Rates From an Effective Date

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

Sec. 5, subd. 30(g) (39 Stat. 430, 39 U. S. C. §551) At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation.

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by airplane and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, [and so much of subsection (g) of section 3 of this Act as is in conflict with this section is repealed.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

† Bracketed words deleted by amendment of August 14, 1935 (49 Stat. 616).

AUTHORITY TO FIX RATES

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Express Power to Make Retroactive Adjustments in Specific Situations

Sec. 3 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster

Sec. 6(c) (49 Stat. 617) Any contract (1) let, extended, or assigned pursuant to the provisions of this

See Section 406(a)(1) (*supra*, pp. A8-A9).

General's order numbered seventy-seven hundred and twenty, of December eighteenth, nineteen hundred and thirteen, respecting rates upon and limit of weight of parcel-post packages, effective from January first, nineteen hundred and fourteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after January first, nineteen hundred and fourteen, for the remainder of the contract terms, not exceeding one per centum thereof per annum.

Sec. 4 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425). That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails

Act, and in full force and effect on March 1, 1935, or (2) which may be let subsequent to such date pursuant to the provisions of this Act and shall have been satisfactorily performed by the contractor during its full initial period, shall, from and after such date, or from and after the termination of its initial period, as the case may be, be continued in effect for an indefinite period, and compensation therefor, on and after March 1, 1935, during such period of indefinite continuance, shall be paid at the rate fixed by order of the Commission under this Act, subject to such additional conditions and terms as the Commission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for cause by the contractor upon sixty days' notice.

Above provision added by amendment of August 14, 1935, superseding first sentence of Sec. 6(c) set forth above under "Termination of Mail Contracts".

mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thir-

tract terms, not exceeding one half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425) That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

Sec. 5, Subd. 39 (39 Stat. 429) Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided*, That if the final decision of

mission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for

cause by the contractor upon sixty days' notice.

Above provision added by amendment of August 14, 1935, superseding first sentence of Sec. 6(c) set forth above under "Termination of Mail Contracts".

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the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

Factors to be Considered in Setting Rates

Sec. 5, subd. 29 (39 Stat. 429, 39 U. S. C. (543). In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

Sec. 5, subd. 30(i). (39 Stat. 430, 39 U. S. C. (554). For the purposes of [the Railway Mail Pay Act] the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Factors to be Considered in Setting Rates

Sec. 6(e) (48 Stat. 936) In fixing and determining the fair and reasonable rates of compensation for air-mail transportation, the Commission shall give consideration to the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources, and from a consideration of these and other material elements, shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom. [In arriving at such determination the Commission shall disregard losses resulting, in the opinion of the Commission, from the unprofitable maintenance of non-mail schedules, in cases where the Commission may find that the gross receipts from such schedules fail to meet the additional operating expense occasioned thereby. In fixing and determining such rates, if it

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Rate-Making Elements

Sec. 406(b) (52 Stat. 998, 49 U. S. C. 486(b)). In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the per-

rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

Sec. 5, subd. 30(i) (39 Stat. 430, 39 U. S. C. 554). For the purposes of [the Railway Mail Pay Act] the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

air-mail transportation, the Commission shall give consideration to the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources, and from a consideration of these and other material elements, shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom. [In arriving at such determination the Commission shall disregard losses resulting, in the opinion of the Commission, from the unprofitable maintenance of non-mail schedules, in cases where the Commission may find that the gross receipts from such schedules fail to meet the additional operating expense occasioned thereby. In fixing and determining such rates, if it shall be contended or alleged by the holder of an air-mail contract that the rate of compensation in force for the service involved is insufficient, the burden of establishing such insufficiency and the extent thereof shall be assumed by him. In no case shall the rates fixed and determined by the said Commission hereunder exceed the limits prescribed in section 3(a) of this Act.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

U. S. C. 486(b)). In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

PENDING ADMINISTRATIVE PROCEEDINGS

Sec. 1108(b) (52 Stat. 1029, 49 U. S. C. §678(b)) The provisions of this Act shall not affect any proceedings pending before the Secretary of Commerce or the Postmaster General, or proceedings pending before the Interstate Com-

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 977, 49 U. S. C. §§ 401-691
		merce Commission for the determination of rates for the transportation of air mail by aircraft, on the date of the enactment of this Act; but any such proceedings shall be continued, orders therein issued, appeals therefrom taken, and payments made by the Postmaster General pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceeding shall continue in effect until modified, terminated, superseded, or repealed by the Authority or by operation of law: *Provided*, That the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".
	Duty to Re-examine Effective Rates	
Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. 565a) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application, provided said carrier or carriers have an interest therein.	Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the transportation of air mail by airplane under this Act so far as consistent with the provisions of this Act.	No specific provision.

		State Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".
	Duty to Re-examine Effective Rates	
Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. §553) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application, provided said carrier or carriers have an interest therein.	Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the transportation of air mail by airplane under this Act so far as consistent with the provisions of this Act. Sec. 6(b) (48 Stat. 935, as amended 49 Stat. 617) The Interstate Commerce Commission is hereby directed at least once in each calendar year from the date of the award of any contract to examine the books, accounts, contracts and entire business records of the holder of each air-mail contract, and to review the rates of compensation being paid to such holder in order to be assured that no unreasonable profit is being derived or accruing therefrom, and in order to fix just rates. In determining what may constitute an unreasonable profit the said Commission shall take into consideration the income derived from the operation of airplanes over the routes affected, and in addition to the requirements of sections 3(f) of this Act, shall take into consideration all forms of expenditures of said companies in or-	No specific provision.

der to ascertain whether or not the expenditures have been upon a fair and reasonable basis on the part of said company and whether or not the said company has paid more than a fair and reasonable market value for the purchase or rent of planes, engines, or any other types or kind, or class, or goods, or services, including spare parts of all kinds, and whether or not the air-mail contracting company has purchased or rented any kind of goods, commodities, or services from any individuals who own stock in or are connected with the said contracting companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives.

Requirement That Carrier Estimate Fair Rate

STATEMENT OF POSTMASTER GENERAL AND CARRIER

Sec. 406(e) (52 Stat. 998, 49 U. S. C. §486(e)). Any petition for the fixing of fair and reasonable

companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives.

Requirement That Carrier Estimate Fair Rate

None

None

STATEMENT OF POSTMASTER GENERAL AND CARRIER

Sec. 406(c) (52 Stat. 998, 49 U. S. C. §486(c)). Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the Authority to be material to the inquiry.

Judicial Review of Rate Orders

None [See *United States* v. *Griffin*, 303 U. S. 226.]

None

ORDERS OF AUTHORITY SUBJECT TO REVIEW

Sec. 1006(a) (52 Stat. 1024, 49 U. S. C. §646) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air

carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

NOTICE OF AUTHORITY; FILING OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

POWER OF COURT

(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order fur-

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

NOTICE OF AUTHORITY; FILING OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

POWER OF COURT

(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

FINDINGS OF FACT BY AUTHORITY CONCLUSIVE

(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

NOTE: The Authority is now known as the Board.

Other Relevant Provisions of the Civil Aeronautics Act

Notice of Tariff Change

Sec. 403(c) (52 Stat. 993, 49 U. S. C. 483(c)). No change shall be made in any rate, fare, or charge, or any classification, rule, regulation or practice affecting such rate, fare or charge or the value of the service thereunder specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Authority may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Power to Prescribe Rates and Practices of Air Carriers

Sec. 1002(d) (52 Stat. 1018, 49 U. S. C. 642(d)). Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Authority shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Authority shall determine and prescribe the lawful rate, fare, or charge (or

the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Authority shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

RULE OF RATE MAKING

Sec. 1002(e) (52 Stat. 1018, 49 U. S. C. §642(e)). In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Authority shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Power to Prescribe Divisions of Rates

Sec. 1002(h) (52 Stat. 1018, 49 U.S.C. (642(h)). Whenever, after notice and hearing, upon complaint or upon its own initiative, the Authority is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, the Authority shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Authority may require the adjustment of divisions between such air carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Authority finds to be just, reasonable, and equitable.

APPENDIX B

The Board's previous exercise of power to set rates retroactively as of a date prior to the institution of a rate proceeding.

In this Appendix we shall review the proceedings in which the Board has recognized or exercised the power to change rates retrospectively to a date prior to the institution of a rate proceeding.*

A. The New Route Cases

Occasionally an airline has begun operating a new route without filing a rate petition. In such cases the Board has gone back of the date when the petition was filed and made its final rate retroactive to the time when operations started. *All American Aviation, Inc., Mail Rate for Route No. 49*, 3 C. A. B. 79 (route operated 4 months before proceeding begun); *United Air Lines Transport Corp., Mail Rate for Route No. 57*, 3 C. A. B. 381 (route operated 9 days before proceeding begun); *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61 (route operated 54 days before proceeding begun); *Caribbean-Atlantic Airlines,*

* Of course a "temporary" rate is frequently increased retroactively to a date prior to the institution of the proceeding brought to change that rate. See, *e.g., Northwest Airlines, Inc.*, Order No. E-721, July 29, 1947; *Florida Airways, Inc.*, Order No. E-765, Aug. 19, 1947; *Monarch Air Lines, Inc.*, Order No. E-898, Oct. 20, 1947; *Empire Air Lines, Inc.*, Order No. E-896, Oct. 20, 1947; *Florida Airways, Inc.*, Order No. E-897, Oct. 20, 1947; *Southwest Airways Co.*, Order No. E-899, Oct. 20, 1947; *Chicago & Southern Air Lines, Inc.*, Order No. E-1096, Jan. 5, 1948. In its opinion last adjusting TWA's domestic rates, the Board said it was establishing a "tentative rate" (*Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 602), but the magic word "tentative" or "temporary" did not appear in the order.

Inc., Mail Rates, 6 C. A. B. 407 (route operated 27 months before proceeding begun); *Pioneer Air Lines Inc., Mail Rates*, 8 C. A. B. 175 (route operated 20 days before proceeding begun).

The Board tried to justify this result on the ground of necessity. "Obviously when a new operation is commenced the question of mail compensation for that operation from its commencement must be decided" (81-82). Of course some procedure for affording the airline full compensation must exist. But it is equally obvious, however, that such a procedure does exist in new route cases, without conjuring up some special power to set rates prior to the time when a petition is filed. All the airline need do, to get full relief, is to file a petition when it starts operations. Indeed, it can petition for a rate even before it has begun to operate.* The Board's attempt to distinguish the new route cases on the ground of supposed necessity is utterly unsound.

The Board then noted that new route cases involve "no question of the retroactive revision of a final rate, since no rate at all was in effect for the new routes" (82, footnote 32). Recently it recognized that this position was too broad, and that it makes no difference that "no rate at all was in

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* See, *e.g.*, *Mid-Continent Airlines, Inc.—Mail Rate for Route No. 48*, 2 C. A. B. 392; *Northwest Airlines, Inc.—Mail Rate Proceeding for Route No. 45*, 2 C. A. B. 827; *Trans-Texas Airways*, Order No. E-900 (Oct. 20, 1947); *Colonial Airlines, Inc., Bermuda Services Mail Rates*, Order No. E-1153 (Jan. 26, 1948); *Piedmont Aviation, Inc.*, Order No. E-1277 (Mar. 9, 1948). A "permanent" rate can be—and has been—fixed even before operations have begun. See, *e.g.*, *Continental Air Lines, Inc.—Mail Rates for Route No. 43*, 1 C. A. A. 182, 189; *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 258. More recently, only a temporary rate has been established when operations have not yet started. See, *e.g.*, *Braniff Airways, Inc.*, Order No. E-966 (Nov. 10, 1947).

effect for the new routes.'" * Moreover, the Act draws no distinction between the Board's *power* to fix a new rate by "retroactive revision of a final rate" and its *power* to fix a new rate where no such revision is involved. In one case, the carrier is made whole by retroactively increasing its compensation from an inadequate amount to a fair one; in the other, the increase is from another inadequate amount —zero—to the same fair rate.

Indeed, the Act does not talk about "final" rates at all. There is no period during which a rate necessarily will be "final" in the sense of being certain to remain in effect unchanged. Unlike the situation under the Railway Mail Pay Act and the Air Mail Act, under which a rate could not be reexamined for six months, there is no period during which the Board's mail rates are frozen and incapable of being changed. For the Act permits a new rate proceeding to be instituted at any time.

Thus, on March 1 the Board may fix a prospective rate, based on evidence taken months before, to take effect on March 2 or some future date. Anyone is free to start a new proceeding on March 2 to effect a change in that rate.

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* In *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), a carrier was operating star routes and receiving mail pay under contracts with the Postmaster General. On September 4, 1945, it filed a petition to have the Board fix rates. Later it amended the petition to ask that rates be fixed as of January 1, 1943. By analogy to the "new route" cases, the Board held that it had power to grant such retrospective relief. "The fact that in this case the carrier received some compensation, while in the new route cases there was no compensation, is not determinative of the real issue. The important point is that in neither case was there a previously fixed rate for the required service in accordance with the standards of Section 406" (p. 5). Because the "carrier waited such a long time to file its petition" it imposed the burden of proof of inadequacy on it (p. 6).

While that proceeding is pending, and until the Board makes a new order, mail compensation will be paid on the basis of the prospective rate. Even the Board admits, however, that it has power in the new proceeding to fix a different rate which will be retrospectively effective as of March 2. In that event the accounts between the Post Office and the airline will be adjusted back to March 2. Thus the prospective rate fixed on March 1 will never have been "final" in the sense of being immune from revision for any period of time.

Once a mail rate is fixed, therefore, it is "final" only in the sense that while it persists unchanged, it controls the action of the parties. In practice, that "finality" will continue if the Board is held to have the power to revise rates retrospectively back of the filing date of a petition. Few prospective rates will require such retroactive change. Rates will be revised retroactively only in appropriate cases of need, when the Board's prediction is shown to have been substantially wide of the mark. A rate order will therefore be no more and no less "final" than it is today, when concededly its supposed "finality" can be destroyed by filing a petition the day after its issuance.

Apart from that, the Board has actually undertaken revision of what it is pleased to call "final" rate orders.

B. The "Nunc Pro Tunc" Petition Device

In May 1942 the Armed Forces took over many of the air carriers' planes, and severe restrictions on service were imposed. To alleviate the resulting hardship, the Board issued two "general memoranda" to all airlines, which are set forth in full in Appendix C, *infra*. In the first, the Board, calling attention to its "*policy* of not making rates effective prior to the institution of a proceeding" (pp. C1-

C7, *infra*), suggested that it might institute a new rate proceeding on June 1, 1942, for the benefit of carriers having no such proceeding pending. The second memorandum of June 3, 1942, stated:

> "The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942, to file a petition under Section 406 of the Act requesting such review. *The Board will accept any such petition filed within the next two weeks as being dated June 1, 1942, if the carrier concerned so desires.*"

Perhaps the Board thought that in this fashion it could pay lip service to its "policy" while avoiding prejudice to any carrier which had withheld a petition in the hope that the Board would start a proceeding itself. But if the Board lacked *power* to make a rate retrospectively effective as of a date earlier than the filing of a petition, of course it could not acquire it by allowing a petition to be filed *nunc pro tunc* that earlier date. That is true no matter how equitable the carrier's claim for relief would be. See, e.g., *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258, 261; *The Bayonne*, 159 U. S. 687, 692-693; *Gagnon* v. *U. S.*, 193 U. S. 451; *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 145; *Old Nick Williams Co.* v. *U. S.*, 215 U. S. 541, 544. Thus the Board actually invited carriers to file petitions asking for retroactive relief which it now says it was powerless to grant.

In *United Air Lines Transport Corp.—Mail Rate Proceeding*, 3 C. A. B. 289, a petition to revise a rate had been

filed on December 26, 1941. On December 15, 1941, one of the carrier's schedules had been discontinued by the Post Office Department. This caused a reduction in its total mail compensation. In January 1942 the carrier asked that its petition be amended so as to ask an adjustment of the rate as of December 15, 1941. The Board did not want the carrier's total mail compensation reduced. Hence it allowed the amendment and then adjusted the rate on the route upwards as of December 15 (p. 292). To be sure, the carrier's total mail compensation was not "substantially" affected, but the fact remains that the Board actually increased the rate as of a date before the petition was actually filed, thus exercising power which it now claims did not exist.

C. Retroactive "Reopening" of "Final" Rate Orders

In one of its earliest rate cases, the Board retroactively increased a rate, long after it had become "final", without paying even lip service to its "general policy."

In June 1939 certain transatlantic mail rates were established, effective May 20, 1939. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220. The order set excess rates for loads over 1,600 pounds, "provided such trip shall have been completed at least as far as Foynes, Ireland or Lisbon, Portugal" (p. 258). It was very clear that excess rates were not allowed for mail carried only as far as the Azores (pp. 257, 258). Eight months later the Board "reopened" the proceeding on its own motion "to determine whether the rate of compensation being paid . . . for the transportation between the United States and . . . the Azores" was fair "and in case such rate should not be found to be fair and reasonable,

to fix and determine the fair and reasonable rate" therefor. *Pan American Airways Co. (of Delaware)—Transatlantic Mail Rates*, 1 C. A. A. 650. It found that the existing rate was unfair. "The fact that the volume of mail between the United States and the Azores is nominal in no way alters the fact that petitioner is entitled to a fair and reasonable rate of compensation for the service rendered in transporting such mails" (p. 652). Thereupon it "amended" its original order, retroactively as of May 20, 1939, to authorize excess rates on mail carried to the Azores (p. 654). Thus, it clearly revised the rate previously fixed for carrying mail to the Azores, retroactively as of a date 8 months before it reopened the proceeding.

Conversely, in *Pan American Airways, Inc., Latin-American Rate Case*, 3 C. A. B. 657, 6 C. A. B. 85, the Board set a final mail rate of 17.83¢ per airplane mile beginning September 1, 1942. Then the Board discovered it had given the carrier too much. By an order of February 28, 1944, the proceeding was "reopened" and the rate "placed under general review" (6 C. A. B., at p. 92).* Then by an

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* The carrier had previously filed a petition to reopen the proceeding. It had been granted on November 25, 1942, but only "with respect to certain limited issues," and the proceeding had not been reopened with respect to the rate in question. The order of February 28, 1944 (Serial No. 2326), recited "that review and possible revision of the rate of compensation effective from and after September 1, 1942 . . . is necessary" and that "review and revision of the rate previously fixed in this proceeding . . . is not within the scope of the issues now pending before the Board pursuant to its order of November 25, 1942, reopening this proceeding," and expressly ordered that the proceeding be "reopened for the purpose of rehearing, reargument and reconsideration with respect to the rate of compensation to be paid Pan American Airways, Inc. for the transportation of mail by aircraft on the Latin American routes from and after September 1, 1942. . . ."

order of July 17, 1944, the Board reduced the rate to 13.32¢ per airplane mile, effective September 1, *1942*.*

If the Board has no power to revise rates retroactively in a new proceeding, manifestly it cannot create that power by the transparent device of calling the new proceeding a "reopening" of the old one, for "the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed" (*U. S.* v. *Mayer*, 235 U. S. 55, 70). See, *e.g.*, *Delaware, Lackawanna & Western Rd. Co.* v. *Rellstab*, 276 U. S. 1, 4-5; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 549, 552; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320. Hence these decisions necessarily recognized that the Board has power to change a rate retroactively as of a time antedating the proceeding instituted to effect that change.

D. The "System" Cases

1. *Western Air Lines, Inc.—Mail Rate for Routes Nos. 13, 19, and 52*, 4 C. A. B. 441, involved an airline which originally had only two routes, on which "final" rates were in effect before 1941. On *June* 12, 1941 it began mail service over a new route. In *December* 1941 it petitioned the Board for an order fixing rates for its entire system of three routes. Later it moved to withdraw that petition and

* Below it was sought to sustain this action by reference to §1005(d) of the Act (49 U. S. C. §645(d)), which says: "Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper." Of course, if §1005(d) applied it would equally confer power on the Board in this case to "modify" its order fixing TWA's mail pay. But the fact remains that §1005(d) is expressly made subordinate to all other provisions of the Act, including of course §406(a)(1). The Board's power to act retroactively was necessarily derived from §406(a)(1).

asked to have a rate fixed only for the new route. The Board denied that motion because it thought the rates "should be considered and determined upon a system basis" and that "the rates of compensation payable to respondent on all of its routes should, in so far as feasible, be subject to review and determination during the period" of operations over the new route (p. 442).

Concluding that "a review of respondent's need for mail compensation subsequent to *June* 12, 1941, is in order" (p. 444), the Board reviewed operations over all three routes from that date. It decided that the "mail compensation already paid respondent" on its two old routes "was adequate to meet all of its need" (p. 444). Because those rates "adequately compensated respondent for the services rendered over its entire system" it felt "no revision of such rates is necessary" (p. 445).*

Referring to its action in retroactively reviewing the fairness of the old rates during the six months before filing of the petition, the Board said (p. 444):

> "This, it should be emphasized, arises out of the unusual circumstances surrounding this case, where even though no proceeding was pending, a review of respondent's mail compensation was necessitated by the operation of a route for which no rate of mail

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* Similar action was taken where final rates were previously in effect for all routes. *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143. Rates were in effect for all of TWA's routes prior to 1941. On *March* 13, 1941, TWA petitioned for a new rate for just one route. On *August* 13, 1941, the Board commenced a proceeding to set new rates for all other routes of TWA, consolidating it with TWA's petition. The Board reviewed the rates on all routes from *March* 13, 1941 as "under the present circumstances the Board deems it necessary to review the operations of petitioner as a whole" but found that no revision was necessary.

compensation had been fixed. In the absence of like unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order."

Actually the new route did not "necessitate" the Board's action at all. The Board is able to fix rates on a "system" or over-all basis, rather than for each route, because "the Act does not *require* the maintenance of the route concept."* But the Act does not require the "system" basis of rate-making either. The Board has recognized that "we may fix a rate for a single route if such a review indicates the necessity therefor" (*Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143), and has done just that several times.** Thus retroactive revision of the previous rates on the old routes in a system is not at all mandatory merely because a new route is begun.***

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* *Inland Air Lines, Inc.—Mail Rates for Routes Nos. 28 and 35*, 3 C. A. B. 491, 492. See also, *Eastern Air Lines, Inc., Mail Rate Proceedings*, 3 C. A. B. 733, 740; *Pennsylvania-Central Airlines Corp., Mail Rates*, 4 C. A. B. 22, 25.

** See, *e.g., Mid-Continent Airlines, Inc.—Mail Rate for Route No. 48*, 2 C. A. B. 392, 393; *Pan American Airways, Inc., Latin-American & Miami-Leopoldville Services, Mail Rates*, Order No. E-738, July 24, 1947, p. 12. Indeed, in certain cases the Board regards itself as constitutionally obligated to fix a rate for a "segregated" route rather than the whole system. *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, 68.

*** Unquestionably the Board must take into consideration the airline's revenue from other sources when fixing the amount of compensation to be paid for a new route. But the airline must be paid some compensation for the additional service on that route. *Pan American Airways Co. (of Delaware)—Transatlantic Mail Rates*, 1 C. A. A. 650, 652. The "rate of compensation" cannot be less than the reasonable value of that service, based on *quantum meruit* principles. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 252.

If the Act confers no power to reduce the excessive rates at which an airline has been paid on certain routes, because those rates are "final," the Board cannot accomplish that result indirectly when the airline later begins a new route. Yet that is what it did in the *Western* case. Nominally it left the old rates on the system unchanged, and gave the airline nothing for carrying mail over the new route. Realistically, it reduced the compensation on the system retroactively back of the date of the petition, since the airline received no more mail pay although it rendered more mail service.

The Board now says that the circumstances in the *Western* case were quite different from those here, and neither "the grounding of planes" nor "labor difficulties" are "particularly unusual" (82-83, and footnote 33). Of course there is nothing at all unusual about opening a new route. But the argument completely misses the point. Section 406(a)(1) does not give the Board special power where a carrier adds a new route to its system, or where "unusual" circumstances arise. Its language is completely general. Certainly it creates no hierarchy of "unusual" circumstances, drawing fine-spun distinctions between one "unusual" situation and another. If the Board lacks power to make a "retroactive revision of a fixed rate" on old routes, it cannot usurp that power just because a new route has been inaugurated and it usually likes to set a rate for an entire system.

2. In the *Western* case the old rate was nominally left undisturbed. Quite recently the Board modified an old rate in terms as well as in fact. A carrier operated two old routes, under a rate of 21.61 cents per airplane mile. *Colonial Airlines, Inc., Mail Rate*, 7 C. A. B. 415. On April

15, 1946, it started two new routes. In December 1946 it filed a rate petition. The Board fixed a lower temporary rate (20 cents per airplane mile) on *all four* routes, retroactively to April 15, 1946. *Colonial Airlines, Inc.*, Order No. E-408 (Apr. 1, 1947).*

3. Recently the Board struggled to reconcile the decision herein with its holdings in the "system" cases. An airline at first operated only one route, on which a final rate was in effect. *Northeast Airlines, Inc., Mail Rate—Route No. 27*, 4 C. A. B. 181, 194. On *May* 1, 1945, it began a second route. On May 14, 1945, it petitioned for a rate on that new route alone. On *June* 20 1945, the Board began a proceeding to fix a rate for the "system," and consolidated the proceedings. It reviewed the facts back to May 1, 1945, and fixed the compensation for the system "for the period beginning May 1, 1945" at a lump sum, "equal to 29.36 cents per airplane mile flown" (*Northeast Airlines, Inc., Mail Rates*, Order No. E-1230 [Feb. 26, 1948] order p. 2). Since that rate did "not provide an *upward* adjustment of mail rates on the old Route No. 27 for the period prior to June 20, 1945, when proceedings were initiated with respect to that route" the case was thought by the Board to present "no problem of retroactivity within the principle of the TWA" case (opinion, pp. 35-36).

This carries hair-splitting to the nth degree. First the Board reads into §406(a)(1) a limitation forbidding rates

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* Later the Board proposed an increase to 50 cents per airplane mile temporarily, stating that "the permanent rate . . . fixed shall be retroactively effective to *April 15, 1946.*" Order No. E-1263 (Mar. 4, 1948), p. 5. Evidently the Board realized belatedly that it was doing precisely what it had held, in this case, it could not do, for when it put the increase into effect, it said that the "final rate" would be "retroactive to such date as the Board shall then determine". Order No. E-1340 (Apr. 1, 1948), p. 4.

to be retroactively revised earlier than the time when the new proceeding begins. Until that time, rates are conclusively presumed to be frozen at a fair amount. Next it engrafts on the limitation an exception which enables it to unfreeze those rates to effect a retroactive revision in the "system" cases. Then it reads into that exception another one which permits the revision to be made downward, but not upward. Such mental gymnastics indicate that something is radically wrong with the Board's basic interpretation of the Act.

E. Significance of the Board's Action

Judged by its actions, the Board regards §406(a)(1) as providing that it is:

> "empowered and directed . . . to make such rates effective from such date as it shall determine to be proper, but only if that date does not antedate the date when the Board takes action upon its own initiative or when such a petition is filed, unless (a) the previous rates has expressly been called a 'tentative' or 'temporary' rate, or (b) the rate is being established for a new route, or (c) the Board permits the petition to be filed or amended *nunc pro tunc* some earlier date, or (d) the Board decides to 'reopen' an earlier proceeding and issue an 'amended' or 'revised' order, or (e) the carrier begins a new route and the Board desires (although it is not required) to adjust compensation retroactively on a system basis, but in that event it may make the adjusted rate retroactive only if it is lower than the previous rate."

This hodgepodge of rarefied and meaningless distinctions is what Congress is now supposed to have intended by the simple, clear words of §406(a)(1)!

Until its decision below the Board cautiously but repeatedly exercised the power now disclaimed. This administrative interpretation is added proof that there is nothing "ambiguous" about §406(a)(1). But if the Act mysteriously became ambiguous after ten years, the Board's original and long-standing interpretation would be decisive.

"An agency may not finally decide the limits of its statutory power. That is a judicial function" (*Social Security Board* v. *Nierotko*, 327 U. S. 358, 369). Where a statute is ambiguous, however, its interpretation by administrative agencies goes "far to remove doubt as to its meaning if any existed" (*First National Bank* v. *Missouri*, 263 U. S. 640, 658), and is always "entitled to great weight" (*Boutell* v. *Walling*, 327 U. S. 463, 471). For applications of this principle in mail pay cases, see *U. S.* v. *Alabama Great Southern Rd. Co.*, 142 U. S. 615, 621; *Grand Trunk Western Ry. Co.* v. *U. S.*, 252 U. S. 112, 121; *Luckenbach Steamship Co.* v. *U. S.*, 280 U. S. 173, 182. "The practice has peculiar weight when"—as here—"it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294, 315; quoted in *U. S.* v. *American Trucking Assn. Inc.*, 310 U. S. 534, 549). See also, *Great Northern Ry. Co.* v. *U. S.*, 315 U. S. 262, 275; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

We submit that §406(a)(1) is perfectly plain, but if its clear words can be tortured into "ambiguity", the Board's previous interpretation has pointed the proper way to resolve any doubt on that score.

APPENDIX C

Civil Aeronautics Board's Memoranda of May 22 and June 3, 1942

May 22, 1942

Memorandum to the President of Each Domestic Air Carrier:

The Board has been considering what action should be taken by it with respect to the mail rates of air carriers (both those carriers which now have mail rate cases pending and those which do not) in the light of the new service pattern necessary under the recent transfer of planes to the Military. Attached is a statement of general principles designed to provide a basis for action in these circumstances.

The Board feels that the course of mail rate cases will be clarified and expedited if the Board could have in advance such criticism, modification or amplification of these suggestions as the carriers deem warranted or desirable.

Will you, therefore, please transmit twelve copies of any comment of your company to the Board by May 29, 1942. The question of oral presentation of views is reserved for consideration in the light of subsequent developments.

A copy of this memorandum is being sent to all counsel for the carriers.

L. Welch Pogue
L. Welch Pogue
Chairman

Attachment

Statement of General Principles to Govern Mail Rate Cases in the Light of the New Service Pattern

1. Having in mind the restrictions and changes in operation which will result from the delivery of planes to the Military and the operation of still further planes for the Military under contract, it will be necessary to review the mail rates of all air carriers affected thereby for the purpose of revising them in the light of the change in operations. This necessity for review applies to all air carriers affected by the change whether their rates are presently the subject of a rate proceeding or not.

2. It is desirable that, in so far as possible, for procedural purposes in connection with mail rate cases, the date of the changeover to the new service pattern be regarded as having occurred on the same date for all carriers and that such uniform date be the last day of a month. For this purpose May 31, 1942 is suggested.

3. Because of the uncertainties inherent in the present situation and the period of time which will undoubtedly be required to adjust to the new service pattern, it is not feasible to fix fair and reasonable rates for the future on the information presently available or which will be available until the process of adjustment has been substantially completed. Therefore, all rates effective on and after the date of the changeover to the new service pattern should be temporary in character, and should be subject to review and adjustment as to such period as experience may show the necessity for adjustment after a reasonable period of time. At the same time it is considered desirable in the case of all

carriers who now have rate proceedings pending to fix as rapidly as possible a final rate to be effective for all periods under review up to the date of the changeover to the new service pattern.

4. For the purposes of accomplishing the above objectives, it is proposed in all pending rate cases of carriers affected by the new service pattern, including those in which show cause orders have already been issued, to fix a rate which will be final for all past periods under review down to May 31, 1942, and temporary for the period thereafter. With respect to all carriers who do not now have a rate proceeding pending, it is proposed, in view of the Board's policy of not making rates effective prior to the institution of a proceeding, to issue an order instituting a proceeding to fix and determine the fair and reasonable rates for each such carrier from and after the date of the changeover to the new service pattern. It is the intention that this order will bring into issue the rate presently being paid such carrier and make such rate for the period subsequent to June 1, 1942 subject to review and adjustment after sufficient experience has been accumulated.

5. After sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become somewhat stabilized, it is proposed to issue in all proceedings a show cause order setting forth a tentative final rate, upon the general principles hereinafter set out, for the period beginning on the date of the changeover to the new service pattern. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed for the period then under review.

6. It is contemplated, however, that in any case where the carrier can show financial distress due to the fact that its total revenues, including both non-mail of all kind and mail, furnish it with insufficient income to support its operations, the carrier may apply for adjustment of its temporary rate to afford it relief from such distress prior to the fixing of a final rate for the period.

7. The carriers' expenses should be brought to a level consistent with the scope of the operations which can be expected to result from the combined commercial and military operations. This principle must be qualified, however, by recognizing that: (a) It can not be expected that the carriers will be able to reduce expenses in the full proportion in which their level of operations is reduced; (b) they should maintain such organizations as will enable them to be prepared to deal promptly and efficiently with any new obligations which may be imposed upon them by military requirements; and (c) the carriers will not be able to effect immediate reductions in expenses to the extent which may ultimately be appropriate.

8. Where all operations at a point have been discontinued, the expenses formerly incurred at such point should not be considered in the mail rate unless it appears that the carrier is bound by a non-cancelable contract for such expenses and receives no other reimbursement of such expenses, or unless it appears that certain expenses are necessary for protection or maintenance of facilities at such point. Notice of cancelation of some contracts and "adjustment payments" for cancelation may be necessary.

9. The profit element of mail rates should be fixed without substantial reference to stimulus for development of

commercial revenues and traffic, and should not undertake to compensate the carriers for any lack of profit under the contracts with the Military, but should be fixed to provide an incentive for keeping expenses during the war to a minimum compatible with safe and efficient service.

10. Consideration will be given to the possibility of establishing standards for total operating expenses, or for certain categories of expense, as a criterion of economy of operation.

11. The Board will require such information concerning the carrier's revenues and expenses incident to its operations for the Military as may be necessary to enable the Board to give appropriate consideration to such revenues and expenses in fixing mail rates in these cases.

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Memorandum to the President of Each Domestic Air Carrier:

On May 22, 1942 the Board submitted to you a statement of general principles designed to provide a basis for action in mail rate cases in the light of the new service pattern necessary under the recent transfer of planes to the Military. An opportunity was given the carriers to present written comments to the Board thereon, and comments have now been received from a number of carriers.

In view of the substantial differences of opinion among the carriers expressed in their comments, the Board has decided to withdraw the suggestions contained in its earlier memorandum. In lieu thereof, the Board will follow the procedure outlined hereinafter.

The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942 to file a petition under section 406 of the Act requesting such review. The Board will accept any such petition filed within the next two weeks as being dated June 1, 1942 if the carrier concerned so desires. In the event such a petition is filed, the Board, after sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become somewhat stabilized, will issue in such proceeding a show-cause order setting forth a proposed rate. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed both for the past and future periods.

In all pending rate cases of carriers affected by the new service pattern, including those in which show-cause orders have already been issued, the Board will proceed in accordance with its usual procedure to fix a final rate both for the period prior and subsequent to June 1, 1942. Such final rate will be based primarily upon evidence concerning the past operations of the carrier. It is recognized that the forecasting of the future under existing circumstances is extremely difficult, if not impossible. It is, therefore, assumed that any evidence submitted concerning the future period will deal, so far as possible, with general principles and probable trends except where specific commitments have already been made or specific facts are already determined. The rates fixed in the pending proceedings will be final so far as these proceedings are concerned, and, if

the carrier concerned desires any adjustment in this rate in the future, it will be necessary for it to file a petition in the normal way.

The Board recognizes that in special instances unusually expeditious treatment of rate proceedings will be necessary, and it will do its utmost to provide such treatment in those cases.

A copy of this memorandum is being sent to all counsel for the carriers.

Civil Aeronautics Board

June 3, 1942

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

GERALD B. BROPHY,
Attorney for Petitioner.

CHARLES PICKETT,
JOSEPH S. ISEMAN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 169 F. (2d) 893. It appears at pp. 111-115 of the Transcript of Record. The majority opinion of the Civil Aeronautics Board, which has not yet been officially printed, appears at pp. 60-91, and the dissenting opinion appears at pp. 92-108, of the Transcript of Record.[1]

[1] For brevity, the following abbreviations will be used hereafter. Numbers in parentheses refer to the pages of the Transcript of Record. The "Act" means the Civil Aeronautics Act of 1938, as

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (see Pub. L. 773, 80th Cong., 2d Sess., c. 646) and §1006(f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U. S. C. §646(f)). The order of the Court of Appeals was entered on August 2, 1948. Petition for a writ of certiorari was filed on October 30, 1948, and granted on December 6, 1948 (93 L. ed. adv. op. 125).

Statement of the Case

Petitioner is an air carrier engaged in transporting persons, property and mail by aircraft in the United States and elsewhere under certificates of public convenience and necessity issued under the Act by respondent, Civil Aeronautics Board.

Section 406(a)(1) of the Act empowers and directs the Board, upon its own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper . . .".

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amended. Act of June 23, 1938, c. 601, 52 Stat. 973, as amended, 49 U. S. C. §§401-691. See Appendix B, *infra*. The Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called "the Board." (The functions of the Authority were transferred to the Board by Reorganization Plan No. IV, effective June 30, 1940. 54 Stat. 1235, 5 Fed. Reg. 2421). Petitioner will sometimes be called "TWA."

Unless otherwise stated, all italics are ours.

The basic question is whether the Board has any *power* to determine that a new rate for carrying the mail should be made effective from a date prior to the filing date of the airline's petition. Whether TWA should obtain such relief, on the merits, is not the question here. The merits have not been examined—the Board has been held powerless to examine them. The question of power arose in the following manner.

1. The Petition for a New Rate

By petition filed March 14, 1947 (8-13), TWA applied to the Board, pursuant to §406 of the Act, for an order fixing and determining fair and reasonable rates of compensation, effective January 1, 1946, for transporting mail by aircraft over certain routes (designated as routes Nos. 2, 38, 44 and 58) operated by it wholly within the United States. That petition stated, in substance, the following.

By order dated October 26, 1945, the Board reduced TWA's rate for carrying mail over its domestic routes to 45¢ per ton mile, retrospectively effective as of January 1, 1945 (10)[2]. TWA suffered losses in every month after the issuance of that order except June 1946 (9-10). These losses were partly due to a common postwar experience: costs kept rising while mail revenue declined (8). They were largely caused, however, by conditions peculiar to TWA.

TWA first received new 4-engine Constellation aircraft in September 1945 (8). Because of certain controversies, these airplanes were not placed in service until

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[2] *Transcontinental & Western Air, Inc., Mail Rates,* 6 C. A. B. 595.

February 1946 (8-9). By June 1946 enough Constellations were in operation to enable TWA to report a net profit for that one month (9).

On July 11, 1946, however, all Constellations were suddenly grounded by the Administrator of Civil Aeronautics (9). This grounding was beyond TWA's control. No other domestic airline then had Constellations in operation (9). Because of the grounding, all TWA's Constellations were out of revenue service until the middle of September 1946, and many for even longer (9). Meanwhile virtually all TWA's costs continued (9). Instead of enjoying anticipated profits from summer operations, TWA suffered serious losses (9).

That blow was hardly over when, on October 21, 1946, TWA's operations were completely shut down by a strike of its pilots (9). The pilots had demanded higher wages. A Fact Finding Board appointed by the President of the United States under the Railway Labor Act, which is applicable to air carriers, recommended an increased pay scale. TWA promptly put the recommendation into effect (9). Nonetheless the pilots served an ultimatum demanding an even higher wage scale within 30 hours (9). If TWA had granted the pilots' demand, its costs would have been even higher (9). The strike then ensued. The shutdown following the strike continued for almost four weeks and caused further severe financial losses (9).

The petition alleged that the old 45¢ rate had not been fair and reasonable since January 1, 1946 (10) and, pursuant to §406(c) of the Act, proposed a new rate (11).

2. The Procedure Below

On May 27, 1947, Public Counsel of the Board moved that the Board, without hearing the merits, dismiss so much of TWA's petition as requested a new mail rate for the period from January 1, 1946 to March 14, 1947, the date the petition was filed. The principal ground of this motion was that "as a matter of sound general policy" the Board should not make such a retrospective adjustment (15).

On June 11, 1947, TWA answered this motion, pointing out that the Board had the duty to hear and consider the merits of any petition involving matters within its jurisdiction (22-25). Thereafter, on June 23, 1947, Public Counsel amended their motion to dismiss by adding a new ground: that the Board had "no authority" to adjust a rate retroactively (38).

After oral argument (41-60), the Board granted the motion by an order dated December 2, 1947 (91). Dismissal was not on the merits, nor in the exercise of discretion, but solely on the ground—advanced by a majority of three members—that the Board lacked *power* to fix a rate effective before the date the petition was filed (63-90). Member Lee dissented with an opinion (92-108).

On January 30, 1948, TWA applied for review of the Board's order by the United States Court of Appeals for the District of Columbia which, on August 2, 1948, affirmed the Board's order with an opinion by Judge Prettyman (111-115). Petition for certiorari was granted by this Court on December 6, 1948 (118).

Specification of Errors

1. The Court of Appeals erred in holding that the Act does not empower the Board to pass on the merits of TWA's petition of March 14, 1947, asking that a new mail rate be made effective from a date prior to the filing of the petition.

2. The Court of Appeals erred in failing to hold that the Act, and particularly §406(a)(1) thereof, delegates to the Board the power of Congress to set a new rate for TWA retrospectively effective as of a date which the Board determines to be proper, whether or not it antedates March 14, 1947.

3. The Court of Appeals erred in holding that the Board's power to fix mail compensation under the Act is limited by an "almost conclusive presumption against power to take retroactive action," when no such presumption applies.

4. The Court of Appeals erred in holding that §406(a)(1) of the Act should be judicially circumscribed by false analogies to other statutes differing completely in language and purpose, and particularly to statutes regulating the rates of public utilities engaged in two-dimensional activities.

5. The Court of Appeals erred in holding that the Board is empowered to change mail rates retrospectively only from the initiation of the rate proceeding and in failing to hold that the practical considerations which compel pub-

lic utility rates to be changed only prospectively have no application to mail compensation.

6. The Court of Appeals erred in holding that the Board has no power to determine that a mail rate was excessively high prior to the initiation of a rate proceeding and that in consequence the Board is likewise powerless to determine that a mail rate was unreasonably low prior to such initiation.

7. The Court of Appeals erred in holding that the legislative history of the Act shows that the provision of §406(a) giving the Board power "to make such rates effective from such date as it shall determine to be proper" should be given a limited effect.

8. The Court of Appeals erred in failing to hold that the Board's previous exercise and acknowledgment of its power to make mail rates effective as of dates prior to the institution of a rate proceeding constitutes an administrative interpretation entitled to particular weight in the construction of the Act.

9. The Court of Appeals erred in failing to hold that the Act, if interpreted to deny the Board any power to increase mail rates effective from a date prior to initiation of a proceeding to revise an old rate, would violate the Fifth Amendment to the Constitution of the United States, in that it would deprive petitioner of property without due process of law and take its property without just compensation.

10. The Court of Appeals erred in affirming the order of the Board.

Summary of Argument

Whenever the Board fixes a future mail rate, it makes a prophecy. In the field of air transportation, mail pay prophecies are peculiarly speculative. When events show that a prophecy was wrong, the Board is required to correct it. So the Act provides. Indeed, since the airlines are required to carry the mails, revision is constitutionally necessary.

Mail rates must always be sufficient to enable the airlines to carry out the Act's objectives, as expressed principally in §2 and §406(b). Hence §406(a)(1) both empowers and directs the Board "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . and to make such rates effective from such date as it shall determine to be proper."

The basic issue in this case is simple. Changing a mail rate for the future does not remedy its past unfairness. Concededly the Board has full power to adjust the rate back to the filing date of the proceeding brought to revise the rate. The question here is whether its power to fix a *proper* effective date is arbitrarily limited by the start of that proceeding, or whether it has power, after hearing the facts and weighing the merits, to determine that a rate adjustment should *properly* be made effective as of a day antedating that filing date.

It is not necessary to speculate as to the Congressional "intent." The Board was given power to make its rates "effective from such date as it shall determine to be proper." Those are not words of limitation but of complete delegation of discretion. For many years Congress

itself exercised the power to adjust mail pay retrospectively. By §406(a)(1) Congress delegated to the Board full power to correct false prophecies by adjusting mail rates retrospectively, not a limited power to adjust them back only to the filing date of a rate proceeding and no further.

Read as a whole, the Act compels the same conclusion. Its purposes require that the language be given its plain meaning. When Congress gave the Board power to change "public utility" rates—passenger and cargo rates—as distinguished from mail compensation, it expressly limited the Board to making changes effective only for the future or "from the date of filing" of the proceeding, rather than from *any* date "it shall determine to be proper." The distinction reflects long-standing practical differences between public utility and mail rates. It underscores the breadth of the power conferred by §406(a)(1).

For ten years the Board has been making rates effective as of dates prior to the start of a rate proceeding. Its only statutory authority for this action was derived from §406(a)(1). After a decade it set out to discover "whether the section was not intended to have a somewhat narrower meaning" (68). Suddenly it found that language which it had earlier termed "plain" had somehow become "ambiguous." It and the Court of Appeals created, and then resolved, that ambiguity by a series of false analogies and unsound policy arguments.

Thus, it was claimed that a narrower construction is justified by an analogy to usual public utility rate determination statutes, although the Act itself refuses to draw the analogy. It was contended that to interpret §406(a)(1) the way it reads would "guarantee" a profit to

every airline regardless of the character of its service, totally ignoring the standards prescribed in §406(b). It was argued by the Court that our contention would empower the Board to lower rates retrospectively. To that we agree, and we are puzzled by the Court's concern. If the airlines are to be protected against unreasonably low mail rates, the Government should be protected against unreasonable profits accruing from excessively high mail rates. Numerous other arguments of like nature were advanced.

While all these arguments are unsound, as we shall show in detail, their basic fallacy is that they erect variable *policy* considerations into a rigid limitation on the Board's *power*. Questions of policy are for Congress to resolve. Congress resolved them in no uncertain terms. Its only statement as to what it was trying to accomplish, contained in the Conference Report on the Act as it was finally passed, confirms the fact that §406(a)(1) was intended to give the Board the broad, flexible power to fix rates as of any date determined to be proper after hearing the evidence pro and con.

The only question involved here is whether TWA shall have the opportunity to present evidence on the "proper" effective date of an adjusted rate. A decision granting TWA a hearing will merely enable the five-man Board to weigh the facts. If the facts do not justify the Board in increasing the rate retrospectively, the Board will not be bound to take that action. By refusing a hearing on the point, the decision below frustrates the basic policy of the Act to afford full relief to an airline whose economic soundness has been impaired by events unforeseen when the Board's previous rate prediction was made.

POINT I

The Act clearly delegates to the Board the power which has been held non-existent.

Under the Act, carrying air mail is not a matter of choice. Every air carrier authorized to carry mail must "transport mail whenever required by the Postmaster General." §401(m), 49 U. S. C. §481(m); *cf.* §401(k), 49 U. S. C. §481(k). From this statutory duty flows a constitutional right to just compensation,[3] as the Act recognizes. "Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided." *Ibid.*

Consequently the Board is "empowered and directed . . . to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith . . . and to make such rates effective from such date as it shall determine to be proper." §406(a) of the Act, 49 U. S. C. §486(a). The "rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft." *Ibid.*

The rates which the Board is to "fix and determine from time to time" are not, therefore, rates in the abstract. They are "rates of *compensation*"—more precisely, "fair and reasonable rates of compensation."

Determining a reasonable rate of compensation for carrying the mail is no simple matter even when the services

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[3] *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 78, 79.

have already been performed and the actual results of operation are known. It is far more difficult, however, to forecast what fair compensation for carrying the mails will be in the future. Every such forecast involves a prophecy. That is true in the relatively stable field of rail transportation, although the forecaster has over a century of past experience on which to draw. It is especially true in the much newer and less stable field of air transportation.

"In air transportation we can see but dimly the shape of things to come." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 339. "The determination of a fair rate necessarily includes consideration of the susceptibility of the industry to large and unpredictable fluctuations of net operating income." *Delta Air Corp.—Mail Rates for Route Nos. 24 and 54*, 3 C. A. B. 261, 285. Recently the Board remarked again on "the inherent weakness in prophecy as to revenues and expenses." *Pan American Airways, Inc.*, Order No. E-771, p. 6, Aug. 25, 1947. When it set TWA's mail rates in 1945, it emphasized that fact time and again.[4]

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[4] *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595. Thus, it remarked that "accurate forecasts of future operations are complicated not only by uncertainty as to the direction in which these curves will move in the future but also because of uncertainty as to the relative timing and rate of movement of each individual curve" (pp. 597-598). ". . . it is not possible under existing circumstances to arrive at a fully reliable determination of the probable future mail costs" (p. 600). Likewise it referred to "the dynamic conditions now developing" (p. 601).

This decision appeared simultaneously with others setting the same 45¢ mail rate for three other domestic airlines. *Eastern Air Lines, Inc., Mail Rates*, 6 C. A. B. 551; *American Airlines, Inc., Mail Rates*, 6 C. A. B. 567; *United Air Lines, Inc., Mail Rates*, 6 C. A. B. 581. It is revealing to compare the Board's predictions

Any determination of air mail rates for the future is therefore peculiarly "a forecast subject to all the frailties of prophecy." *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 81 App. D. C. 89, 95; 155 F. (2d) 169, 175. When the forecast proves false, revision of the prophecy in light of the actual facts is desirable and, when the rate becomes unreasonably low, constitutionally mandatory.

Congress could, of course, undertake the revision itself. In fact, several times it has adjusted mail rates retrospectively by special legislation. Sometimes private laws have been passed to remedy specific past injustices.[5] At other times general statutes have made retroactive changes in mail rates—both upwards and downwards.[6]

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of these airlines' annual profits (on which it based the 45¢ rate) with the actual profits or losses reported for 1946 and 1947 (*Civil Aeronautics Board, Recurrent Reports of Financial Data*):

	Net Operating Profit Predicted by Board	*Actual Net Operating Profit or Loss*	
		1946	1947
TWA	$3,459,000	$ - 9,675,898	$ - 4,747,098
American	5,997,000	- 318,315	- 4,159,124
United	7,162,000	976,402	- 5,203,699
Eastern	3,754,000	8,221,876	2,859,703

[5] Congress has authorized, by private bill, mail carriers to sue in the Court of Claims to recover compensation to which, for some reason, they had no contractual right. *Kendall* v. *United States*, 12 Pet. [U. S.] 524; *Roberts* v. *United States*, 92 U. S. 41; *Wightman* v. *United States*, 23 C. Cl. 144. Of course the consent to suit could be withdrawn by a later statute, leaving the mail carrier remediless. *Chorpenning* v. *United States*, 94 U. S. 397.

[6] Thus, the Act of July 12, 1876, c. 179 (19 Stat. 79, 82) directed the Postmaster General "to readjust the compensation to be paid from and after the *first* day of July, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed" by a prior act. By its very terms

For example, when Congress established the parcel post system in 1912, it failed to provide for a general increase in mail rates.[7] For years railroads were unable to obtain

this statute was retroactive. It was held inapplicable to certain railroads, on the ground that under their contracts no right had been reserved to change the pay if mail service were continued. *Chicago & Northwestern Ry. Co.* v. *United States*, 104 U. S. 680; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 104 U. S. 687; see *St. Paul & Duluth Rd. Co.* v. *United States*, 112 U. S. 733, 735. As to other railroads, however, the statute was held applicable and given effect. *Jacksonville, Pensacola & Mobile Rd. Co.* v. *United States*, 118 U. S. 626; *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, 395-396; *Wisconsin Central Rd. Co.* v. *United States*, 164 U. S. 190; *cf. Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389.

Similarly, the Act of *August* 24, 1912, c. 389, §4 (37 Stat. 539, 554; 39 U. S. C. §574) provided for readjustment of mail pay in certain cases where mail was diverted from a railroad; "readjustment made hereunder shall not take effect before *July* first, nineteen hundred and twelve, and shall be for diversions occurring after *January* first, nineteen hundred and twelve." This statute was applied in *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 256 U. S. 610. Plaintiff was carrying mail under a 1910 contract. Early in 1912 it discontinued a fast train which had been operating when the 1910 contract was made. After the statute was passed, the Postmaster General ordered the mail diverted from plaintiff's line to two other railroads. In 1913 the Postmaster General diminished plaintiff's mail pay, and increased the two other lines' compensation, as of *July* 1, 1912. This Court sustained his order. Mr. Justice Holmes said (p. 614):

> "The statute itself contemplates a readjustment in respect of past services, since it was not approved until August 24, 1912, and allows a readjustment from the first of the previous July. As the change in pay is made in respect of a change that has occurred in the service by which the current pay was fixed, the railroad suffers no injustice, and, as we have said, by the terms of its arrangement it took the risk of such a statute being passed."

[7] The parcel post system was inaugurated effective January 1, 1913. Act of August 24, 1912, c. 389; 37 Stat. 557. At that time mail rates were based on the weight of the mails carried, rather

adequate relief, although some legislation was passed to improve their situation.[8] Finally in 1916 Congress authorized increases in their pay for carrying parcel post, retroactive to stated dates in 1913 and 1914.[9] At the same time—*July* 28, 1916—the Railway Mail Pay Act "authorized and directed" the Postmaster General "to readjust the compensation to be paid to railroad companies from and after the thirtieth day of *June*, nineteen hundred and sixteen, or as soon thereafter as may be practicable" for mail of all kinds "at the rates hereinafter provided."[10]

Likewise, the revision of the Air Mail Act of 1934 in *August* 1935 provided that compensation under existing contracts for carrying air mail "shall be paid at the rate fixed by order of the Commission under this act" from

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than the space occupied. Parcel post weighs relatively less, proportionate to the space occupied, than regular mail. Hence the new system acted to reduce the carriers' compensation. The original act authorized an increase in the compensation of "star routes and screen-wagon contractors" on proof of inadequacy. See 37 Stat. 558; *Halstead* v. *United States*, 55 C. Cl. 317; *Hooton* v. *United States*, 58 C. Cl. 639. No such increase was authorized for railroads; "there was a widespread belief that the railroads were overpaid." *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 75.

[8] While the Act of March 4, 1913, c. 143 (37 Stat. 797) permitted the Postmaster General to make a limited increase in the railroads' compensation after July 1, 1913, it was purely discretionary. If he failed to exercise his discretion, the railroads were left without remedy. *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 241 U. S. 451; *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 73.

[9] Act of July 28, 1916, c. 261, §§3 and 4 (39 Stat. 425), quoted *infra*, pp. B10-B11. See *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 73, footnote 2.

[10] Act of July 28, 1916, c. 261, §5, subdivision 1 (39 Stat. 425), quoted *infra*, p. B11.

"on and after *March* 1, 1935."[11] Decisions under this statute are reviewed *infra*, pp. 53-59.

Adjusting inequitable mail rates by special legislation is, however, a cumbersome and slow process at best. Revision by an administrative agency can be more flexible and less dilatory. Hence Congress created the Board to take over the burden for it in the field of air transportation.

The Act conferred on the Board sufficiently broad power to enable it to cope with all situations that might arise, thus reducing appeals for legislative relief to a minimum.[12] By the unique language of §406(a)(1) of the Act—itself a unique statute—Congress delegated to the Board plenary power to correct its false prophecies by adjusting mail rates retrospectively, without regard to any arbitrary filing date.

By §406(a)(1) the Board is "empowered and directed" to "make such rates effective from such date as it shall determine to be proper." On its face, this language is perfectly clear. Indeed, in 1943 the Board remarked on "the *plain* language of the statute relative to the Board's discretionary power to make rates effective from such date as it deems proper." *American Airlines, Inc. et al., Mail Rates*, 4 C. A. B. 90, 93. Curiously enough, in 1947 it thought that "ambiguity is clearly present" (68).

More comprehensive words than are found in 406(a)(1) would be hard to imagine. As the Board pointed out in

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[11] Act of August 14, 1935, c. 530, §8; 49 Stat. 617, quoted *infra*, pp. B10-B11.

[12] *Cf. United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79: "Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act."

one of its first mail rate cases, it is given broad discretion to select any date deemed proper. "The language of section 406(a) gives to the Authority [Board] the right to exercise a sound discretion in determining the proper date on which a rate shall be made effective." *Pan American Airways Co. (of Nevada)—Mail Rates*, 1 C. A. A. 385, 409. No limitation on that discretion is imposed, although of course the Board must regard the statutory objectives. The Board stated this forcefully in *American Airlines, Inc. —Mail Rate Proceeding*, 3 C. A. B. 323, 331:

> "We conclude that section 406(a) of the Act vests in the Board *complete discretion* to determine the date upon which its orders thereunder shall become effective. In exercising this discretion, we are limited *only* by the procedural requirements of notice and hearing and by the necessity of promoting the broad objectives of the Act."[13]

Thus the unwieldy process of petitioning Congress for special legislation to correct past inequities has been obviated. Of course the Board is not compelled to make retrospective changes regardless of circumstances—any more than was Congress. It must, however, after hearing and weighing all the facts of the particular case, select a proper effective date. It can be the day on which its order is issued, or even a future day. Likewise it can be a past day which may or may not antedate the institution of the rate proceeding. Complete pliability is the essence of the statutory scheme in this respect.

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[13] The Board reiterated this conclusion in *American Airlines, Inc. et al. Mail Rates*, 4 C. A. B. 90, 92. The statutory objectives are set forth in Sections 2 and 406(b) of the Act; see pp. 37-39, B1-B2, B12-B13 *infra*.

The sweeping scope of §406(a)(1) is illuminated by its contrast with other parts of the Act dealing with changes in public utility rates for carrying passengers and cargo.

All air carriers must file with the Board "tariffs showing all rates, fares and charges" for passenger and cargo transportation, under §403(a) of the Act, 49 U. S. C. §483(a). The carrier may change these rates, but only prospectively. "No change shall be made in any rate, fare, or charge . . . specified in any effective tariff . . . except *after* thirty days' notice of the proposed change . . . Such notice shall plainly state . . . the time such change *shall* take effect. The Board may in the public interest . . . allow such change upon notice less than that herein specified . . ." §403(c) of the Act, 49 U. S. C. §483 (c). So too the Board may review the filed rates and fix different ones, but only *in futuro*, for §1002(d) of the Act, 49 U. S. C. §642(d), provides:

> "Whenever, after notice and hearing . . . the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier . . . is or will be unjust or unreasonable . . . the Board shall determine and prescribe the lawful rate, fare, or charge . . . *thereafter* to be demanded, charged, collected or received or the lawful classification, rule, regulation or practice *thereafter* to be made effective . . ."[14]

Similarly, §404(a) of the Act, 49 U. S. C. §484(a), requires air carriers to "establish just, reasonable, and

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[14] Manifestly the Board's power under this section is purely prospective. *Cf. Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 464.

equitable divisions" of joint passenger and cargo rates "as between air carriers." The Board may "upon complaint or upon its own initiative" investigate "the divisions of joint rates" and "prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers." §1002(h), 49 U. S. C. §642(h). That section goes on to say:

> "The Board may require the adjustment of divisions between such air carriers *from the date of filing the complaint* or entry of order of investigation, *or such other date subsequent thereto,* as the Board finds to be just, reasonable and equitable."

Thus when Congress wanted to prevent the Board from taking any retrospective action, it said so. When it wanted to prevent the Board from taking retrospective action back of the date of a proceeding, it said so. It said nothing of the sort in §406(a)(1). Instead it gave the Board full authority to make mail pay rates "effective from such date" —past, present or future—"as it shall determine to be proper." This marked contrast between §406(a)(1) and the other provisions of the Act was completely ignored below.

The opinion below reads into the flexible language of §406(a)(1) a rigid limitation on the Board's power.[15] The Board is to determine "fair and reasonable rates of compensation," and it may make the rate "effective from such date as it shall determine to be proper"—but not if that date is earlier than the filing date of the rate proceeding. A rate may become unfair and unreasonable on one day.

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[15] ". . . we should not write in limitations which Congress did not see fit to make." *Price* v. *Johnston*, 334 U. S. 266, 284.

If the rate proceeding does not start until a month later, however, the Board is held powerless to remedy the past injustice, for it may not make the fair rate effective as of the day when the old one became confiscatory. Full relief may be granted only if, by some lucky coincidence, a rate proceeding happens to be pending on that day for some totally different reason.[16]

For example, on March 1 two airlines may be equally affected by the sudden grounding of airplanes which they both use.[17] If a rate proceeding involving airline X happens to be pending at the time, the Board is free to adjust X's mail rate to allow for the increased costs due to the grounding. If no rate proceeding involving airline Y is pending on March 1, however, the Board is unable to adjust Y's mail rate back to March 1, although Y's need for increased mail pay may be exactly the same as X's. It must stop short at the later date when the rate proceeding involving Y got under way.[18]

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[16] Rate proceedings before the Board generally take from one to four years. See *Civil Aeronautics Board, Report of Formal Economic Proceedings*, March 31, 1948, p. 41, showing one mail rate proceeding which had been pending for over four years, four proceedings pending for over three years, five proceedings pending for over two years, and fifteen proceedings pending for over one year.

[17] In *Braniff Airways, Inc.*, Order No. E-2129, Oct. 28, 1948 the Board pointed out that "costs attributable to the grounding of aircraft types are neither normal nor recurrent in nature," and "are neither predictable nor capable of actual measurement on a prospective basis" (p. 18).

[18] Such a situation has actually developed. On November 1, 1947, all DC-6 airplanes were grounded. *American Aviation Daily*, Nov. 12, 1947, p. 210. Both United Air Lines, Inc. and American Airlines, Inc. were using DC-6 aircraft and receiving the same mail rate. United had a rate proceeding pending; American had none. The DC-6 airplanes were gradually restored to service between March

The Act contains no such arbitrary limitation on the Board's power. It has simply been imported into the statute by main force. This amendment of the statute by judicial fiat is the more unwarranted because it makes it impossible for an airline to obtain full redress when a rate prophecy is mocked by events.

Even when a sudden catastrophe occurs, and rates are bound to be affected, it is not physically possible for an airline to act instantly. The Act requires a petition to be more than a routine piece of paper. The airline must make a conscientious estimate of a fair rate. "Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable." §406(c), §49 U. S. C. §486(c). If an airline is to comply sincerely with §406(c), it cannot possibly file a petition the moment a disaster occurs. Especially is that true when the calamity is of uncertain duration, such as a strike or the grounding of airplanes, so that one can only speculate whether its effect will pass quickly or persist indefinitely.

The rule adopted below operates just as arbitrarily when the unfairness of a rate develops imperceptibly, as it usually does. "It is impracticable to determine when a rate, reasonable at the time of establishment, will become unreasonable." *Air-Mail Compensation*, 206 I. C. C. 675, 725.

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11 and June 1, 1948. On April 7, 1948, the Board proposed to increase United's rate temporarily back to January 1, 1948. At the same time it instituted a proceeding proposing to increase American's mail rate—but only as of April 7, 1948, since no proceeding was pending before then! See Orders Nos. E-1351 and E-1355, Apr. 7, 1948. The proceedings are still pending, and United may expect to receive compensation reflecting losses arising out of the grounding, but American may not.

It is equally impracticable to detect exactly when a fair rate becomes unfair. Even after unfairness is suspected, the airline may quite reasonably attribute its losses to other causes. No instrument exists which records the precise moment when a fair rate passes into confiscation. With all the advantage of knowledge after the event, the Board's attempt (years later) to fix the day when the rate became unfair will be only an informed guess.

Yet the airline is now told that it must rush to the Board with a petition whenever it remotely suspects that a rate may have become unfair, or risk losing part of its just compensation. It delays at its peril, for the Board will be powerless to grant relief if hindsight shows that the rate was unfair before the petition was filed. Thus a premium is put on hasty, ill-considered petitions, and a penalty is imposed on the airline which files a petition only after events have actually indicated that its fears were well-founded. It is a curious theory indeed which rewards the rash and penalizes the prudent airline.

Actually the Board has repeatedly exercised the power to obviate such untoward consequences which is now disavowed. Until the decision below, it never denied that it had *power* to make mail rates retrospectively effective from any date. The most that it stated was that "as a matter of sound *general* policy there should be no adjustments in mail rates during periods when a rate case is not pending." *Braniff Airways, Inc., Mail Rates for Routes Nos. 9, 15 and 50*, 3 C. A. B. 633, 636.[19] It would be idle to

[19] For other similar "policy" statements, see *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 142-143; *All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 356-357; *Pacific Alaska Airways, Inc., Mail Rates*, 6 C. A. B. 61, 70; *Carib-*

talk of a "general" policy if the Board lacked power to vary it.

Moreover, time and again the Board has both asserted and exercised the power to make rates effective as of a time earlier than the start of a rate proceeding. As the cases are rather lengthy and somewhat technical, they are reviewed in detail in Appendix A hereto. When these cases are read with the decision below, it would seem that the Board must regard §406(a)(1) as providing that:

> "The Board is empowered and directed * * * to make such rates effective from such date as it shall determine to be proper, but only if that date does not antedate the date when the Board institutes a proceeding on its own initiative or when the carrier or the Postmaster General files a petition, unless (a) the rate is being established for a new route, or (b) the rate changes a rate previously established by contract only, or (c) the rate changes a previous rate which the Board labelled a 'temporary' or 'tentative' rate, or (d) the Board permits the petition to be filed or amended *nunc pro tunc* some date earlier than its actual filing, or (e) the Board decides to 'reopen' an earlier proceeding and issue an 'amended' or 'revised' order, or (f) the carrier begins a new route and the Board desires (although it is not required) to adjust compensation retrospectively to an earlier date on a 'system' basis, but in that event it may make the adjusted rate retrospective to such earlier date only if it is lower than the previous rate."

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bean-Atlantic Airlines, Inc., Mail Rate, 7 C. A. B. 943, 946. In only two cases did the Board specifically leave open the question whether power existed. *Continental Air Lines, Inc.—Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401; *Mid-Continent Airlines, Inc.—Mail Rates for Routes Nos. 26 and 48*, 3 C. A. B. 464, 466.

This complicated hodgepodge of rarefied and meaningless distinctions is now offered as what Congress is supposed to have intended by the simple, clear words of 406(a)(1). It is little wonder that, when the Board's Public Counsel originally moved to dismiss TWA's petition, they did *not* claim that the Board had no power to grant it. Indeed, as late as April 18, 1947, Public Counsel asserted:

> "*Although the Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding*, it has consistently held as a matter of sound general policy that no adjustments should be made in mail rates during periods when rate proceedings are not pending."[20]

The clear, express words of §406(a)(1) show that the "Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding." The Act means just what it says.

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[20] Motion of Public Counsel Burt and Redding to dismiss petition for a retrospective rate, *Matter of Mail Compensation of Pennsylvania-Central Airlines Corp.*, Docket No. 484. As the cases cited in Appendix A show, the Board has not "consistently held" even to the "general policy" to which Public Counsel referred.

Public Counsel's original motion in the present case argued only the propriety of the requested increase (13-21). TWA's answer cited familiar authorities showing that the Board could not abdicate its power by denying a hearing on the merits (22-25). Then, two months after the original motion, Public Counsel amended the motion so as to contend that no such power existed (38). The claim of lack of power was a sheer afterthought.

POINT II

The Court of Appeals relied on an inapplicable presumption against a retrospective interpretation.

The Court of Appeals admitted that the Act uses language which could aptly confer power to make retrospective changes in rates.[21] To pare it down, it resorted to a series of false analogies.

"In the first place," said the Court, "we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly specifies such power" (112). If there were any such "presumption," the language of §406(a)(1) would be more than ample to rebut it. But, as the Court's citation of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246, shows, it completely misapplied the familiar principle that "unless the contrary plainly appears a statute applies prospectively only." 110 F. (2d), at p. 254. Since the Act has been in effect all along, it "applies prospectively only" no matter how it is construed.

"Ordinarily, statutes establish rules for the future," *Brewster* v. *Gage*, 280 U. S. 327, 337, and, since "the court will presume that the lawmaking power is acting for the future only and not for the past," *White* v. *United States*, 191 U. S. 545, 552, "laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared," *Shwab* v. *Doyle*, 258 U. S. 529, 534. That is all the presumption against retroactivity means.

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[21] "The language of the disputed clause is not necessarily retroactive. It is as apt in reference to the future as it is to the past" (113).

The presumption has no application to judicial or administrative action taken pursuant to a statute after its passage. To be sure, in certain respects the meaning of a statute may not become known until after it has been judicially construed. In that sense, every case of first impression interpreting a statute necessarily has some retrospective effect, since it determines what the statute meant as well as what it means. Manifestly, however, the presumption against a retroactive interpretation has no relation whatever to the unavoidable fact that often the meaning of a law is not known until it is judicially declared later. *Securities & Exchange Comm.* v. *Chenery Corp.*, 332 U. S. 194, 203-204. Rather the presumption is intended to insure that the legal effect of acts will be determined ordinarily by the statutes then in existence (whenever judicially construed) instead of by later legislation.

Hence a statute is not interpreted retroactively when, as here, it operates only on situations coming into existence after its passage. *Mulford* v. *Smith*, 307 U. S. 38, 51; *Wickard* v. *Filburn*, 317 U. S. 111, 133. Indeed, a "statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds* v. *United States*, 292 U. S. 443, 449.[22] In fact, the *Neild* case so held. 110 F. (2d), at p. 255.

This is not the case of "a new law reaching backwards." *Woods* v. *Stone*, 333 U. S. 472, 477. The Act has been in effect since 1938. This proceeding concerns the fairness of

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[22] See also, *Cox* v. *Hart*, 260 U. S. 427, 435; *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 192; *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 571; *United States* v. *Jacobs*, 306 U. S. 363, 367; *cf. Gryger* v. *Burke*, 334 U. S. 728, 732.

a rate during 1946 and 1947. Throughout the entire period involved in this case, the Act was in force. There can be no "claim of retroactivity" where a statute involves a "recomputation by the state [Board] of taxes [mail pay] under a statute which was existent through the whole period in question." *Illinois Central Rd. Co.* v. *Minnesota*, 309 U. S. 157, 164. "Readjustment under these conditions cannot be said to be retroactive law making." *Woods* v. *Stone*, 333 U. S. 472, 478.[23] The "almost conclusive presumption" on which the Court of Appeals relied is non-existent.

POINT III

The Court of Appeals relied on a false analogy to public utility rate statutes.

The Court of Appeals also rested heavily on a supposed analogy to public utility rate statutes. "The whole is cast in the form of the usual public utility rate-determination measure. Such measures are frequently made effective as of the date of the inauguration of the proceedings, but never, so far as we know, for periods prior thereto" (114). Therefore the unique language of 406(a)(1), which is found in no public utility rate statute, was cut down to mean something less than it says.

Even if the Court's assumption—that §406 of the Act is the "usual public utility rate-determination measure"—were correct, its conclusion would not follow. "A restric-

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[23] See also, *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 135; *Helvering* v. *Reynolds*, 313 U. S. 428, 433. *Cf. United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79; *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 328.

tive interpretation should not be given a statute merely because Congress has chosen to depart from custom." *United States* v. *Sullivan*, 332 U. S. 689, 693.[24] And there were excellent reasons why Congress did not choose to apply public utility rate principles to airmail pay.

1. Undoubtedly in many respects the Act embodies public utility procedures. The Act is hybrid in origin. Its provisions as to certificates of public convenience and necessity, passenger and cargo rate regulation, disclosure of ownership, interlocking relationships, and so forth, are directly derived from sections of the Interstate Commerce Act, particularly those dealing with motor carriers. But, as will appear shortly, the Act's mail pay provision, §406, has an entirely different parentage and different purposes. The only similarity between the "usual public utility rate-determination measure" and §406 is that both employ the word "rates",[25] and that the agencies used to fix the "rates" are called Boards.

Of course the fact that mail pay is determined by a Board of five men rather than (as in earlier days) by one man, the Postmaster General, is of no significance. It is equally irrelevant that §406 uses the word "rates."

Basically the airline is "entitled to receive reasonable compensation" for carrying the mails, as §401(m) of the Act provides. The "fair and reasonable rates of compensation" which the Board fixes under §406 are only the

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[24] See also, *Shapiro* v. *United States*, 335 U. S. 1, 31, footnote 40.

[25] The Court of Appeals seemed to attach considerable significance to the word. "This is the method ordinarily employed by authorities in regulating the charges of public utilities. The word ordinarily used is 'rates'" (113).

means whereby the end result of "reasonable compensation" is computed.[26] As an airline is not obliged to transport a stated quantity of mail during any given period, its total compensation for that period cannot be fixed in advance. Necessarily the compensation is expressed in terms of a "rate" per unit. Multiplying the number of units carried by the rate gives the total "reasonable compensation." When the facts are known, however, the process works just as easily in reverse. Thus, when the Board adjusts mail pay retrospectively to the date of institution of a proceeding it first hits upon a total figure which it believes will provide reasonable compensation, then divides it by the number of units and (reasoning backwards) arrives at an applicable rate.[27]

It is simply bad logic, moreover, to conclude that the Act takes over in a body all the rules peculiar to public utility rate determination because both public utility charges and mail pay are expressed in terms of "rates." As a matter of fact, it was settled long ago that carrying

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[26] *Cf. United States* v. *Griffin*, 303 U. S. 226, 237: "While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question decided by the Commission is . . . the proper compensation to be paid by the Government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mail."

[27] For instance, in *Chicago & Southern Air Lines*, Order No. E-1825 (July 28, 1948), the Board fixed a per unit rate from and after January 1, 1948, but at the same time awarded the lump sum of $3,139,000 as additional mail pay for the two-year period from January 1, 1946 to December 31, 1947. As an afterthought it added in a footnote: "This amount of mail pay is equal to 20.69 cents per airplane mile flown in scheduled service" (Order, p. 2). Thus was the "rate" determined. For other examples, see *infra* notes 45 and 47.

the mail is not a public utility function. "The company in carrying the mails was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities, but in this respect it was serving as an agency of government." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 649.[28] Yet for a century both legislation and judicial opinions have referred to mail pay as being "fixed" by "rates."

Even before railroads were used to carry mails,[29] mail pay was expressed in terms of "rates" or "rates of compensation."[30] In 1845 a statute was passed to insure an "equal and just rate of compensation" for the railroads

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[28] See also, *United States* v. *Hamburg-Amerikanische Packetfahrt Action Gesellschaft*, 212 Fed. 40, 43 (C. C. A. 2); *Bankers' Mutual Casualty Co.* v. *Minneapolis, St. Paul & S. S. M. Ry. Co.*, 117 Fed. 434, 439 (C. C. A. 8); *United Fruit Co.* v. *United States*, 33 F. (2d) 664, 666 (C. C. A. 5); *United States* v. *Atlantic Coast Line R. Co.*, 206 Fed. 190, 194; *Railway Mail Pay*, 269 I. C. C. 357, 362.

[29] Railroads were first designated as "post routes" by the Act of July 7, 1838, c. 171, §2, 5 Stat. 268, 283.

[30] Section 2 of the Act of February 20, 1792, c. 7, 1 Stat. 232, fixed maximum mail pay in terms of the postage rates which were stipulated in §§9 and 10. It authorized the "Postmaster General to enter into contracts, for a term of not exceeding eight years, for extending the line of posts, and to authorize the person or persons, so contracting, to receive, during the continuance of such contract, according to the *rates* by this act established, all the postage which shall arise on letters, newspapers and packets, conveyed by any such post." 1 Stat. 233.

See also §2 of the Act of May 8, 1794, c. 23, 1 Stat. 354, 357; which prescribed that the "*compensation*" received by mail carriers should be "at *rates*" not exceeding the postage on the mail carried; and the Act of May 14, 1836, 5 Stat. 132, which authorized the Postmaster General, "provided the same can be done at the present *rates of compensation*, to extend the term of the existing contracts for the transportation of the mail . . ."

carrying mail.[31] A consolidation of the mail pay statutes in 1872 contained six references to "rates," "rates of compensation" and the like.[32] Many mail pay statutes still on

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[31] See §19 of the Act of March 3, 1845, c. 44, 5 Stat. 732, 738-739:

> "That to insure, as far as may be practicable, *an equal and just rate of compensation*, according to the service performed, among the several railroad companies in the United States, for the transportation of the mail, it shall be the duty of the Postmaster General to arrange and divide the railroad routes . . . into three classes . . . and it shall be lawful for him to contract for conveying the mail with any such railroad company . . . *Provided*, That, for the conveyance of the mail on any railroad of the first class, he shall not pay a higher *rate of compensation* than is now allowed by law . . . [And in case the Postmaster General shall not be able to conclude a contract for carrying the mail on any of such railway routes, at a *compensation* not exceeding the aforesaid *maximum rates, or for what he may deem a reasonable and fair compensation* for the service to be performed, it shall be lawful for him to separate the letter mail from the residue of the mail, and to contract . . . for conveying the letter mail . . . by horse express or otherwise . . .] *And provided further*, That if it shall be found necessary to convey over any railroad route more than two mails daily, it shall be lawful for the Postmaster General to pay such *additional compensation* as he may think just and reasonable, having reference to the services performed and the maximum *rate* of allowance established by this act."

The bracketed portion of the statute survived in paraphrase until quite recent days, the words quoted in italics being retained. See 39 U. S. C. §521, repealed by Act of February 28, 1933, c. 131, §1, 47 Stat. 1349.

[32] Act of June 8, 1872, c. 335, 17 Stat. 283. See §210 ("each railway company shall receive, so far as practicable, a proportionate and just *rate of compensation*, according to the service performed"); §211 ("the Postmaster-General may pay twenty-five per centum in addition to the above *rates*"); §212 (a codification of the statute quoted in brackets *supra* in footnote 31); §214 ("until such price is fixed by law, the Postmaster-General may *fix* the *rate of com-*

the books contain like references.[33] The word "rates" was commonly employed in earlier air mail statutes which were not "public utility rate-determination measures" by any stretch of the imagination.[34] Legislation adjusting mail pay retroactively has been phrased in terms of "rates," and even "rates" to be fixed *in futuro*.[35] Long ago numerous opinions had referred to the "fixing" of "rates" of mail pay.[36]

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pensation"); §257 ("The Postmaster-General shall provide for the carrying of the mail on such route at as low *rate* as possible"); §265 ("The Postmaster-General may allow * * * such additional *compensation* * * * as he may think fit, not exceeding, however, fifty per centum of the said *rates*").

[33] See, *e.g.*, 39 U. S. C. §441 ("The Postmaster General shall not . . . expedite the service under any contract either now existing or hereafter given to a *rate of pay* exceeding 50 per centum upon the contract as originally let"); 39 U. S. C. §448 ("Such payment shall not in any case exceed the *rate of pay* per annum of the contractor or subcontractor"); 39 U. S. C. §450 ("when there is no competition for inland transportation . . . and *the rate of compensation* asked is excessive . . . the Postmaster General may require that the mails be carried as freight or express"); 39 U. S. C. §541a ("the *compensation* for such service to be a *rate* not in excess of the *rate* that would be allowed for similar service by railroad or electric car").

[34] See *infra*, note 64.

[35] Thus, the Railway Mail Pay Act, enacted July 28, 1916, provided for a readjustment of mail compensation back to June 30, 1916, "at the *rates* hereinafter provided." See *supra*, note 10 and *infra*, p. B11. Similarly, the Air Mail Act of 1935, enacted in August 1935, provided that compensation under existing mail contracts "shall be paid at the *rate fixed* by the Commission under this Act" from "on and after March 1, 1935." See *supra*, note 11, and *infra*, p. B11. For other examples, see *supra*, note 6.

[36] See, *e.g.*, *Jacksonville, Pensacola & Mobile Rd. Co.* v. *United States*, 118 U. S. 626, 628 ("After the termination of this contract the petitioner continued to carry the mail as previously, without any notice from the Postmaster-General that the price to be allowed for

Plainly §406 did not take over peculiar public utility principles when it used the word "rates." On the contrary, it was merely employing traditional mail pay language, in vogue long before public utility statutes came into being. In short, it is a gross fallacy to draw any inference from the fact that the word "rates" appears both in this Act and public utility rate legislation.

2. Moreover, the rule—already referred to—that carrying the mail is not a public utility function reflects vital practical differences between mail pay and public utility rates, which are made in this very Act.

As a common carrier of passengers and cargo by air, TWA deals directly with the general public—a large, fluctuating group of travellers and shippers. It collects its charges from each customer individually. Every change in its passenger or freight rates directly hits the pocketbooks of its customers. Retrospective increases of those rates are not practically feasible, any more than a retro-

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the service would be in any respect different, until the 21st March, 1876, when he *fixed the rate of compensation* at a less sum"); *Allman* v. *United States*, 131 U. S. 31, 34 ("These allowances did not exceed 50 per cent of the *rate of compensation fixed* by the contracts as originally let, though they did exceed 50 per cent of the sum named in those contracts"); *Wisconsin Central Rd. Co.* v. *United States*, 164 U. S. 190, 205 ("We agree entirely with the Court of Claims that the terms and conditions imposed on this grant embraced the condition that the mail should be carried at such *rates* as Congress might *fix*"); *Delaware, Lackawanna & Western Rd. Co.* v. *United States*, 249 U. S. 385, 387 ("The *rate* thus *fixed* was paid for two years"); *The Mail Divisor Cases*, 251 U. S. 326, 330 ("The *rates* were *fixed* and reduced in their maxima but that was all that was done with regard to them"); *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, 120 ("If the railroad was land-aided, payment of more than eighty per cent. of the full *rates* otherwise provided by law was unauthorized").

spective increase of any other public utility rate is feasible in practice. Once a customer has paid the published tariff, he does not have to concern himself with future changes in it; it would be intolerable to make an individual passenger or shipper pay a higher rate years later, even though strictly he had been charged too little.

Theoretically a court could say that an electric company, for example, was entitled to collect a higher rate from each of ten thousand persons who had already paid their bills, retrospectively to some past day. As a practical matter, the increase could hardly be put into effect, for "consumers of electricity are constantly changing, and . . . additional charges could scarcely be enforced against those who had not enjoyed the lower rate." *Springfield Gas & Elec. Co.* v. *Barker*, 231 Fed. 331, 335. That is the very reason why enforcement of a utility rate which *prima facie* is confiscatorily low can be temporarily enjoined. "If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted." *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. See also, *Henderson Water Co.* v. *Corporation Comm. of North Carolina*, 269 U. S. 278, 281.[37]

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[37] Retrospective decreases in public utility rates are sometimes possible. Thus if the utility is permitted *pendente lite* to collect a rate which may turn out to be too high, the individual customer may be protected against an overcharge by requiring the utility to post a bond, *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 51; *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 598, or by impounding part of the amounts collected, *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165. See also *Oklahoma Natural Gas Company* v. *Oklahoma*, 258 U. S. 234, 239. There is no way to give the utility comparable relief retrospectively when the rate charged turns out to be too low. Hence a few statutes have per-

Because of these practical considerations, public utility rates look to the future. The Act recognizes that fact. As already seen (pp. 18-19), TWA's public utility rates—its passenger and cargo rates—may be changed only prospectively.

The practical situation is entirely different where mail pay is concerned. As a mail carrier, TWA deals with only one customer—the Government. Compensation for carrying the mail is paid by the Post Office, not by every man who buys an airmail stamp.[38] Changes in mail pay do not directly impinge on any one individual. The Government, as sole customer, never changes its identity; it is always available to bear the cost of retrospective increases, or receive the benefit of retrospective decreases, of mail pay. Retrospective adjustment is practically feasible, and, as noted above (pp. 13-16), has frequently been undertaken.

The difference in treatment was pointed out on May 1,

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mitted temporary reductions in utility rates on condition that, if the temporary rate proves too low, the future final rate shall be high enough to make up the resulting loss. See *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 114-115; *Beaver Valley Water Co.* v. *Driscoll*, 28 F. Supp. 723; *Staten Island Edison Corp.* v. *Maltbie*, 267 N. Y. App. Div. 72, 45 N. Y. S. (2d) 337, affd. 292 N. Y. 611, 55 N. E. (2d) 376.

[38] Moreover, no attempt is now made to compute airmail pay on the basis of anticipated airmail postage revenue. Under the Air Mail Act of 1934, the Interstate Commerce Commission was directed to "keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom." §6(e), 48 Stat. 936, quoted in full *infra*, p. B-3. That provision was deliberately omitted when the Civil Aeronautics Act was passed. In fact, §1108(b) of the Act, 49 U. S. C. §678(b), expressly provided that in proceedings pending when the Act was passed "the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934" quoted above.

1947, by a member of the Board when testifying before a Senate sub-committee:

> "Mr. Ryan. When we fix passenger and cargo rates, those rates are prospective in their operation. They do not relate back.
>
> "Now, of course you can understand the practical reasons for that. Passengers are scattered all over, and their identity is lost.
>
> "Senator Saltonstall. You have only one mail customer.
>
> "Mr. Ryan. That is right. There is just the Postmaster General, and if he overpays as a result of one of our decisions, he will not pay the following year and even up."[39]

Since the underlying considerations are different, mail pay has never been controlled by public utility analogies. *United States* v. *Griffin*, 303 U. S. 226, 237-238. It is hardly surprising, therefore, that §406(a)(1)—unlike the provi-

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[39] *Hearings before Subcomm. of Senate Comm. on Appropriations, 80th Cong., 1st Sess., on H. R. 2436*, p. 574. See also testimony of Mr. Maclay, Assistant General Counsel of the Board, in *Hearings before Subcomm. of House Comm. on Appropriations, 80th Cong., 1st Sess., on Post Office Approp. Bill, 1948*, p. 221:

> "With respect to the Civil Aeronautics Board, there is never a retroactive rate with respect to shippers of express or anything like that.
>
> "The situation, as you know, is entirely different between mail pay and the rate which you are fixing for members of the public to pay. It is mechanically not feasible to fix a retroactive rate when the members of the public are paying it.
>
> "On the other hand, the Civil Aeronautics Act provides with respect to mail pay that the Board can fix the rates in any way it sees fit, as to time, method, type, or anything."

sions of the Act dealing with public utility rates—does not embody the traditional public utility rule but permits mail pay rates to be changed "effective from such date as" the Board "shall determine to be proper."

3. Indeed, in other respects §406 of the Act departs radically from the "usual public utility rate-determination measure."

"It must not be forgotten that the Civil Aeronautics Act is fashioned to a developmental as well as a regulatory objective. Nowhere is this fact made clearer than in those provisions which set forth the standards for the Board's guidance in the exercise of its air mail rate-making function." *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 563. "Certainly, the declaration of policy contained in section 2 differentiates the Act in many important respects from the usual form of public utility regulatory statutes." *American Export Airlines, Inc.—Certificate of Public Convenience and Necessity*, 2 C. A. B. 16, 30; appeal dismissed *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2).

Under the Act, mail pay is not determined by "public utility" principles. "This Board in exercising its rate-making functions has never and does not now measure the reasonableness of the rate in terms of a fair return upon the so-called 'fair value' of the property used and useful in the public service." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 788. Section 406(b) prescribes distinctive standards for determining mail pay: "In determining the rate in each case, the Board shall take into consideration, among other factors . . . the need of each such air carrier for compensation for the transportation of

mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, *to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.*"[40]

"Section 406(b), more than any other passage of the Civil Aeronautics Act, discloses the basic difference between the dual developmental and regulatory objective of this Act and the regulatory objective of the ordinary statute designed for the control of public utility rates." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 335. The Board's mail pay task differs "fundamentally from that which faces the public regulatory body in the fixing of rates for the transportation of passengers and property or in the fixing of rates for public utility services." *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 252-253. See too, *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 755.

Actually mail compensation is, under the Act, "Government subsidy in the form of mail pay." *Annual Report of the Civil Aeronautics Board* (1947), p. 5. "The use of the mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the postal service . . . . The 'compensation' which the carrier receives thus becomes compensation not only for carrying the mail but for the building up of a system of air transportation which will serve the nation's commerce and security as well." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 335.

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[40] 49 U. S. C. §486(b), quoted in full *infra* pp. B12-B13.

"Thus section 406(b) of the Act departs from the customary rate standards." *American President Lines, Ltd., et al., Petition,* 7 C. A. B. 799, 802, note 9. That was made clear in the Board's very first mail pay case, *Mid-Continent Airlines, Inc., Mail Rates,* 1 C. A. A. 45 (at pp. 54-55):

> "The above factors which the [Board] is directed to take into consideration in fixing and determining fair and reasonable rates under the act, *differ from the tests which,* under the influence of judicial decision during the past 40 years, *have been set up for the guidance of public regulatory bodies in fixing rates for public utilities and common carriers* . . . Sections 2 and 406, as well as other sections of the Civil Aeronautics Act, disclose the clear intent of Congress that the problems of civil aviation require special treatment."

Precisely because "the problems of civil aviation require special treatment," §406(a)(1) of the Act uses special language appearing in no other statute.

Hence it is doubly fallacious to try to define the Board's power to change mail rates retrospectively by analogy to public utility rate cases. That fallacy was riddled by the Board when it rejected an argument that, because a case had held that public utility rates could be reduced only prospectively, it could not reduce mail pay retrospectively. *American Airlines, Inc.—Mail Rate Proceeding,* 3 C. A. B. 323.[41] There the Board said (pp. 330-331):

> "Unlike that case, *the instant proceeding does not involve a relationship between a private shipper and a common carrier.* If it did, then the carrier's argu-

[41] The same argument had been rejected in *Air Mail Compensation,* 222 I. C. C. 602, 603-604.

ment that the Board may "retroactively" increase rates apparently has no force in view of the principle that a private shipper, once having paid a published rate, need not concern himself with subsequently having to pay more. *On the contrary, the Postmaster General, unlike the private shipper, is the medium through which continuous financial support necessary for the carriers to fulfill the purposes of the Act is extended. Our obligation is to see to it that the rates he pays are at all times sufficient to enable the carriers to accomplish and maintain those purposes.* Likewise, our obligation is also to see that the rates do not at any time exceed those which are proper under the statute. We must discharge both obligations."

4. The Court was led to espouse its false analogy to public utility rate cases by the assumption that its only real alternative was to regard mail service as rendered under a "cost-plus" contract in which "the net to the contractor is the same no matter what the quality of the performance may be, and he bears none of the risks of the operation" (114). "We cannot find in this statute any language which indicates that Congress intended to guarantee to every carrier a profit" (114).

No one claims that Congress intended to "guarantee to every carrier a profit"—much less a profit regardless of the "quality of the performance." It had to, and did, guarantee that "reasonable compensation" for carrying mail would be received. The Board can, must and always does review costs.[42] It is ever alert to allow only reasonable

[42] Section 406(b) expressly refers to the carrier's need for compensation to enable it to fulfill the statutory objectives *"under honest, economical, and efficient management."*

costs in the light of operating experience.[43] The bugaboo conjured up by the Court is simply imaginary.

Moreover, the dilemma which the Court posed is nonexistent. Even in the field of Government contracts—and of course carrying airmail is no longer a matter of contract—the alternatives are not between a "public utility" system "where a price per unit is fixed" (113) and a "cost-plus" system in which "the net to the contractor" is fixed (114). As procurement experience during the war shows, many devices are available whereby a unit price is stipulated in advance but later adjusted retrospectively so that it does not result in undue advantage to either party.[44]

The broad, flexible provisions of §406 likewise enable the Board both to stipulate mail rates on a per unit basis in advance of performance, and to rectify past errors in its forecasts on the basis of actual experience. In practice the Board does just that. For instance, it often fixes avowedly "temporary" rates for the future, which it later revises retrospectively after the results of operation are known. At one time, to be sure, it declined to promulgate mail rates on a "tentative basis, subject to change according to future operating results" because that "would, in effect, result in the establishment of a 'cost-plus' system of rate making." *All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 357. But it has long since recognized the fallacy of that argument, and now regularly fixes "tem-

[43] See, *e.g.*, *Caribbean-Atlantic Airlines, Inc., Mail Rate*, 7 C. A. B. 943, 951-953; *Pioneer Air Lines, Inc., Mail Rates*, 8 C. A. B. 175, 185-186; *Braniff Airways, Inc.*, Order No. E-2129, Oct. 28, 1948, pp. 15-16.

[44] See *Lichter v. United States*, 334 U. S. 742, 762-763, 768-772.

porary" rates both for new routes[45] and established routes on which "permanent" rates were previously in effect.[46] After operating results are known, it revises the former rates—retrospectively as well as prospectively—on the basis of audited actual costs and other factors deemed pertinent. Clearly in these situations the Board uses both the so-called "post-audit" method to adjust mail rates for past periods and the "price per unit" or "prophecy" method to fix rates for the future.

Moreover, admittedly the Board is required to review rates back at least to the date when a proceeding was begun. Whenever it does that, necessarily it audits actual costs and actual revenues, and weighs them and all other relevant factors in the light of actual experience. Then, if

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[45] See, *e.g., Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 690-691; *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 423; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 618. Sometimes, indeed, the Board does not even profess to fix a "temporary" rate where new or experimental services are involved, but waits for several years to obtain actual operating results, occasionally making "temporary" payments on account. Usually in such instances it awards lump sum payments for past periods, which of course can be expressed mathematically in terms of "rates." See, *e.g., Pan-American Airways, Inc.—Transatlantic Rates*, 8 C. A. B. 267 (June 9, 1947), awarding $1,484,000 for the year 1945; *Pioneer Air Lines—Mail Rates*, 8 C. A. B. 175 (July 2, 1947), awarding $505,420 for mail service on a new feeder line from August 1, 1945, to August 31, 1946; *Pan American Airways, Inc.—Latin-American and Miami-Leopoldville Mail Rates*, Orders Nos. E-738 and E-739 (July 24, 1947), awarding approximately $4,500,000 for services from January 1, 1944, to August 31, 1945. In each of these cases the Board went through the ritual of dividing the lump sum payment by the mileage actually flown to obtain a "rate."

[46] See, *e.g., Pennsylvania-Central Airlines Corp.*, 7 C. A. B. 988, 990; *Chicago & Southern Air Lines, Inc.*, Order No. E-510, p. 7 (May 6, 1947); *National Airlines, Inc.*, Order No. E-1271, pp. 5-6 (March 5, 1948).

its past forecast has proved too low, it is corrected for the past—often for as much as two or three years—and a new rate is set for the future.[47] Here again there coexist in actual practice the two methods of arriving at "reasonable compensation" which the Court thought were mutually exclusive.

Several times the Board itself has pointed out why the "cost-plus" spectre affords no reason to adhere doggedly to a false prophecy when events have proved it wrong. "Although it is not the Board's intention in rate proceedings involving the fixing of mail rates for past periods to determine mail rates merely on a cost-plus basis, it must be recognized that the process of fixing rates for a past period" on a retrospective basis "does assure the air carrier substantial protection against unforeseeable contingencies for which a prospective fair and reasonable rate might well have made inadequate allowance." *Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 291, note 22.[48] Certainly Congress was amply justified in accepting that view, whether the Board now likes it or not.

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[47] See cases cited notes 27, 45 *supra*; *Northeast Airlines, Inc.*, Order No. E-1230 (Feb. 26, 1948) awarding $2,107,578 in increased compensation for the period from May 1, 1945 to April 30, 1947 and setting a new rate for the future.

[48] See also, *Pan American Airways, Inc., Latin-American and Miami-Leopoldville Services Mail Rates*, Order No. E-738, p. 47 (July 24, 1947); *Alaska Airlines, Inc.*, Order No. E-1665, pp. 40-41 (June 4, 1948). "It has been the practice to provide a somewhat lower rate of return for a past period than for a future period in view of the fact that for a past period the probability of error in estimates of operating results is removed and other operating risks have been realized in substantial part." *Braniff Airways, Inc.*, Order No. E-2129, p. 36 (Oct. 28, 1948). See also, *Chicago & Southern Airlines, Inc.*, Order No. E-1885, p. 29 (July 28, 1948); *Delta Air Lines, Inc.*, Order No. E-2130, p. 21 (Oct. 28, 1948).

5. In short, the Court relied on a wholly non-existent dilemma to find an analogy in the practice under public utility rate statutes. That analogy ignores the practical differences between public utility rate statutes and §406 of the Act—differences which explain why the Act carefully distinguishes between the Board's purely prospective power to change passenger and cargo rates and its power to change mail pay rates both retrospectively and prospectively. It ignores the fact that mail pay has never been governed by traditional public utility rate principles, and that §406 deliberately departs from those principles. And it ignores the admonition of *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, where, after noting that all forms of transportation had "common features," this Court warned against exactly the kind of reasoning by false analogy that was indulged in below (333 U. S., at pp. 107-108):

> "But these resemblances must not blind us to the fact that legally as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. . . . However useful parallels with older forms of transit may be in adjudicating private rights, *we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.*"

POINT IV

The Act removed whatever restrictions may have existed under earlier mail pay statutes.

The Court thought that §406(a)(1) "appears to have been designed to establish in the Board the same powers which had theretofore existed at the Interstate Commerce Commission in respect to railway mail" and it "had never been claimed that the Interstate Commerce Commission had unfettered retroactive power" (113). It found justification for whittling down the Act in the "limited legislative purpose" which it thought was "apparent from the history" (113).

If §406(a)(1) were merely designed to codify the powers of the Commission over railway mail rates, the question naturally arises why the Act did not simply copy the words of the Railway Mail Pay Act. Actually the novel language of §406(a)(1) removed any limitations on the power to adjust mail pay rates which existed under earlier, restrictive statutes. That it conferred plenary authority in this respect is indicated by the only expression of Congress on the point, which appears in the Conference Report on the final bill:

> "*This section* empowers the Authority [Board] to fix mail rates and sets forth the congressional policy to guide the Authority [Board] in fixing such rates and *enables the Authority* [Board] *to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier or class of carriers according to the needs of the particular case* . . . These provisions appear in the conference agreement as section 406(a), (b) and (c)."[49]

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[49] *H. R. Rep. No. 2635, 75th Cong., 3d Sess.*, June 7, 1938, pp. 71-72. The same report was made to and adopted by the Senate on June 13, 1938. 83 Cong. Rec. 8961-8963. The bill was approved by the President on June 23, 1938.

Yet the decision below holds that even when the "needs of the particular case" require that the Board "adjust rates" retrospectively so that the airline may "properly" carry out "the policy of Congress," the Board is powerless to achieve that result.

A. Mail Pay Prior to the Railway Mail Pay Act of 1916

Prior to the Railway Mail Pay Act, mail was normally transported pursuant to contracts made with private carriers by the Postmaster General under statutory authority.[50] Details of the contracts were largely left to the Postmaster General, but ordinarily the maximum rates which he could pay were prescribed by statute, though of course he was free to contract at lower rates if he could obtain them.[51]

It was settled doctrine that, except for certain land-grant roads,[52] "railroads were not required by law to carry the mails."[53] They were perfectly free, as a matter of law,

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[50] In rare instances a mail carrier was called on to render services entirely beyond those covered by its contract, or after expiration of a contract. In such situations the carrier was entitled to recover reasonable compensation. *Alvord* v. *United States*, 95 U. S. 356, 359; *United States* v. *Utah, Nevada, & California Storage Co.*, 199 U. S. 414, 423-424; *Hunt* v. *United States*, 257 U. S. 125, 128. Reasonable compensation included "a fair profit." *Freund* v. *United States*, 260 U. S. 60, 70.

[51] *The Mail Divisor Cases*, 251 U. S. 326, 330.

[52] Usually land-grant railroads were obliged by the statutes under which the grants were made to transport mail "at such price as Congress may by law direct." Beginning in 1862, some land-grant statutes were enacted providing that "fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" should be paid for carrying mail, public stores, etc. See *Union Pacific Rd. Co.* v. *United States*, 104 U. S. 662, 665.

[53] *New York, New Haven & Hartford Rd. Co.* v. *United States*, 251 U. S. 123, 125.

to reject the Government's terms and refuse to carry the mail. Carriage of the mails was regarded as a purely voluntary matter of contract.[54] Therefore if a railroad kept carrying mail, it was not entitled to "adequate compensation to be judicially determined"[55] but only what the Government allowed.

As a practical matter, therefore, mail rates were largely fixed by the Postmaster General within the limits set by statute. Either Congress by statute, or the Postmaster General by regulations read into the contracts, took care to reserve the power to change the rates. Of course the railroads were not compelled to keep transporting mail if they did not like the new rates, but if they continued to carry mail they could not recover more than the changed rates no matter how much they protested.[56]

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[54] *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, 395-396; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 78; *United States* v. *Griffin*, 303 U. S. 226, 229, footnote 2. "It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and cannot constitute the basis of a justiciable claim against them for taking property." *New York, New Haven & Hartford Rd. Co.* v. *United States*, 251 U. S. 123, 127.

[55] *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650.

[56] See, *e.g.*, *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, 395-396; *Chicago Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western Rd. Co.* v. *United States*, 249 U. S. 385, 388; *New York, New Haven & Hartford Rd. Co.* v. *United States*, 251 U.S. 123, 127; *St. Louis Southwestern Ry. Co.* v. *United States*, 262 U. S. 70, 73-75. The rule was otherwise as to certain contracts in which it was concluded,

Thus the pre-1916 system of railroad mail pay was inelastic. The only modicum of flexibility in the structure resulted when Congress finally passed statutes permitting or directing an increase or decrease in compensation or private bills to take care of particular situations. In some instances, as already seen (*supra*, pp. 13-15) both increases and decreases in mail pay were ultimately made by retroactive statutes. Years often went by, however, before remedial legislation was enacted.[57] Since changes affecting the railroads, the principal mail carriers, were relatively infrequent, the inflexibility of the rate structure was not as serious as it would have been in the field of air transportation, which is subject to rapid, unpredictable fluctuations in earnings and expenses. Nonetheless the system produced results which were regarded as inequitable and a certain amount of elasticity was imported into it by the passage of the Railway Mail Pay Act in 1916.

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the right to change the rates was not reserved. *Chicago & Northwestern Ry. Co.* v. *United States*, 104 U. S. 680; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 104 U. S. 687; see *St. Paul & Duluth Rd. Co.* v. *United States*, 112 U. S. 733, 735.

[57] For instance, railway mail pay was originally fixed on a mileage basis. In 1864 railway postal cars were introduced for distribution of mail en route, but no additional compensation was provided. Railroads protested without avail. Only in 1872 did Congress pass a statute permitting the Postmaster General to allow any railroad furnishing postal cars "such additional compensation beyond that now allowed by law, as he may think fit, not exceeding, however, 50 per centum of the said rates." Act of June 8, 1872, c. 335, §265; 17 Stat. 283, 316. See *Railway-Mail Pay*, 56 I. C. C. 1, 5.

The next year the mileage basis of computing mail pay was given up for a weight basis. See *The Mail Divisor Cases*, 251 U. S. 326. The effect on the railroads of this weight basis of fixing compensation when the parcel post system was inaugurated, and the years it took before the railroads obtained relief, have already been noted, *supra*, pp. 14-15.

B. The Railway Mail Pay Act of 1916

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." *Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 353. This warning is especially pertinent when comparing the Civil Aeronautics Act with the Railway Mail Pay Act of 1916[58] and the Air Mail Acts of 1934 and 1935.[59] Appendix B contains a detailed comparison of the three statutes.

"The Railway Mail Pay Act terminated the system theretofore prevailing of service under voluntary contracts." *United States* v. *Griffin*, 303 U. S. 226, 229. Railroads were compelled to carry mail. Necessarily they were "entitled to receive fair and reasonable compensation." 39 U. S. C. §541.

This compensation was fixed purely on a *quantum meruit* basis. *United States* v. *Griffin*, 303 U. S. 226, 237. [Under the Civil Aeronautics Act, airlines are not paid for transporting mail on any such restrictive basis.] Mail rates were to be fixed by the Commission, after hearing. "At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation *to be received*, at such stated times as may be named in the order, for the transportation of mail matter . . ." 39 U. S. C. §551. [No such language appears in the Civil Aeronautics Act.]

Once fixed, the rates were to remain in effect until changed. The Commission was "to fix and determine from time to time the fair and reasonable rates and compensa-

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[58] Act of July 28, 1916, c. 261; 39 Stat. 425 ff.; 39 U. S. C. §§524-579.

[59] Act of June 12, 1934, c. 466; 48 Stat. 933; amended by Act of August 14, 1935, c. 530; 49 Stat. 614.

tion for the transportation of such mail matter by railway common carriers . . . and to publish the same, *and orders so made and published shall continue in force until changed by the Commission after due notice and hearing.*" 39 U. S. C. §542. [The difference between this language and §406(a)(1) of the Civil Aeronautics Act is obvious.] No provision for judicial review existed. The statute permitted only "administrative review by 'reexamination' of an order." *United States* v. *Griffin*, 303 U. S. 226, 231. [The Civil Aeronautics Act contains an express provision for judicial review. §1006, 49 U. S. C. §649.]

After it fixed a rate, the Commission had nothing further to do with it until somebody petitioned it for reexamination. It could not "reexamine" the rate on its own initiative. Reexamination could be applied for only by the Postmaster General or the railroad affected. 39 U. S. C. §553. [The Board is not only "empowered" but "directed" to proceed at all times "upon its own initiative" as well as "upon petition of the Postmaster General or an air carrier." §406(a), 49 U. S. C. §486(a).]

Moreover, a rate order could never be reexamined until it had remained in effect six months. "Either the Postmaster General or any such carrier may at any time *after the lapse of six months from the entry of the order assailed apply for a reexamination* and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application . . ." 39 U. S. C. §553. [No such limitation appears in the Civil Aeronautics Act.] And, of course, the Commission was not authorized to make its rate orders "effective from such date as it shall determine to be proper."

Once the Commission fixed a rate, it had to remain in effect at least six months; no one—the Commission, the rail-

road or the Postmaster General—could change it. In view of its highly restrictive language, it is hardly surprising that it was claimed that no power whatever existed under the Railway Mail Pay Act to increase mail pay retrospectively. Yet this Court held that power to increase the rate retrospectively to the date of the petition for reexamination existed by "reasonable implication," although it was "quite aware that minutiae of expression may be found that show Congress to have been thinking of the future." *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.[60]

No issue existed in the *New York Central* case whether mail pay could be increased as of a date earlier than the application for reexamination, and the Court in passing assumed that it could not.[61] The problem actually arose in the "short-line" case of *Macon, Dublin & Savannah Rd. Co.* v. *United States*, 78 C. Cl. 251.

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[60] "This conclusion was reached despite the fact that the applicable statute contained no express authority, such as is contained in section 406(a) of the Civil Aeronautics Act, to determine the date on which rate orders should become effective." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 326-327.

[61] See 279 U. S., at p. 78: "We *assume* that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78." In the case cited, plaintiff claimed that it was not bound to deliver copper under a contract because the copper could have been requisitioned, and therefore the contract was made under duress. This argument was rejected, the Court pointing out that if plaintiff "had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered" (259 U. S., at p. 78). Manifestly a mail carrier can no longer save "the question of the price" and is no longer free to decide whether it will be "willing to contract." Indeed, the "price" is no longer a matter of "contract" at all.

Under orders of the Commission, "separately operated" short-line railroads were entitled to higher mail pay rates than other roads. In May *1931* plaintiff and other short-line railroads filed petitions for reexamination on the ground that since July 3, *1930* they had been separately operated, under a construction adopted that day. The Commission made findings in their favor but refused to award "additional compensation for services rendered prior to the filing of their applications with us." *Railway Mail Pay*, 185 I. C. C. 715, 720. Plaintiff then sued in the Court of Claims for the additional pay from July 3, 1930, to May 1931. A demurrer to its complaint was overruled. "Congress reposed in the Commission the primary duty of determining just compensation, not whether by some act on the part of the carrier it was estopped as a matter of law from receiving just compensation in its entirety." 78 C. Cl., at p. 256.[62] Final judgment was later given for plaintiff, 79 C. Cl. 298.

While the case primarily involved the question whether plaintiff was entitled to one previously determined rate rather than another, it shows that even under the Railway Mail Pay Act—despite its severely restrictive language—it was sometimes possible for a railroad to obtain an increase in mail pay retrospectively to a time antedating its petition for reexamination.[63] No court decision has been found holding to the contrary.

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[62] The Court concluded that the period of underpayment without protest was not "so protracted as to establish, affirmatively, with all the other circumstances, including the fact that plaintiff was not free to decline performance, the defense of acquiescence." 78 C. Cl., at p. 258.

[63] The "short-line" cases (although not the *Macon* case by name) were referred to in the hearings on the predecessor bill of the Civil

C. The Air Mail Acts of 1934 and 1935

Before 1934, air mail rates were fixed by contracts between the Postmaster General and the airlines, made after competitive bidding.[64] Early in 1934 the contracts were cancelled by a new Postmaster General on the ground that they had been improperly made, and the airlines were un-

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Aeronautics Act: *Hearings before a Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st. Sess.*, at pp. 162-163. This document is referred to hereafter as "*Subcommittee Hearings.*"

[64] Prior to 1925 the Post Office transported air mail itself. See *Air Mail Compensation*, 206 I. C. C. 675, 727. §4 of the Air Mail Act of February 2, 1925, 43 Stat. 805, authorized the Postmaster General to contract for the transportation of air mail "at a *rate*" not to exceed four-fifths of the revenues derived from air mail. The Act of June 3, 1926, 44 Stat. 692, enabled the Postmaster General to make contracts "at *fixed rates* per pound" not exceeding certain maximum limits. In 1928 the Postmaster General was authorized to make contracts to carry air mail to foreign countries and insular possessions for periods of not more than ten years "and to pay for such service at *fixed rates* per pound or per mile." Act of March 8, 1928, c. 149, 45 Stat. 248.

In 1928, the Air Mail Act of 1925 was amended by adding a new §6, which permitted the Postmaster General to substitute for certain contracts "an air mail route certificate" effective for a period of ten years. "The *rate of compensation* to the holder of such an air mail certificate shall be determined by periodical negotiation between the certificate holder and the Postmaster General, but shall never exceed the *rate of compensation* provided for in the original contract of the air mail route certificate holder." Act of May 17, 1928, c. 603, 45 Stat. 594.

The Watres Act of April 29, 1930, c. 223, 46 Stat. 259, authorized the Postmaster General to award contracts by competitive bidding "at *fixed rates* per mile" not to exceed $1.25 per mile, and to substitute for an air mail contract a "route certificate" under which the holder would have the right "to carry air mail over the route set forth in the certificate or any modification thereof at *rates of compensation to be fixed* from time to time, at least annually, by the Postmaster General," not exceeding the same amount.

der a cloud.[65] This had the effect of furthering the evolution of legislation which has resulted in our present air transportation system.

From the standpoint of rate flexibility, the 1934 statute, passed shortly thereafter, was far more restrictive than the Railway Mail Pay Act on which it was based. Unlike railroads, airlines were not compelled by law to carry mail. They assumed that obligation voluntarily, by making contracts with the Postmaster General. §3(a), 48 Stat. 933-934. The contracts could be terminated, however, "by the contractor at its option upon sixty days' notice." §6(c), 48 Stat. 935. Rates were stipulated in the contracts, which were let by competitive bidding, but were subject to a specified ceiling. §3(a), 48 Stat. 934. Contracts were to be "subject to any *reduction* in the rate of payment therefor." 6(c), 48 Stat. 935.

Although rates were determined by contract, the Interstate Commerce Commission was also directed to fix by order "rates of compensation for the transportation of air mail by airplane and the service connected therewith . . . but not in excess of the rates provided for in this Act . . . and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing." §6(a), 48 Stat. 935. The limited procedure under the Railway Mail Pay Act, for reexamination only after six months, was taken over bodily by a section making applicable the whole procedure "for the adjustment of rates for carriage of mail by railroads." §6(d), 48 Stat. 935. In addition, a special requirement was imposed that rates be reviewed annually "in order to be as-

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[65] *Pacific Air Transport* v. *United States*, 98 C. Cl. 649, reviewed at length the facts relating to the cancellation.

sured that no unreasonable profit is resulting or accruing." §6(b), 48 Stat. 935.

Thus Congress' whole effort was to keep air mail pay as low as possible.[66] The act was not interpreted as empowering the Commission to increase rates. Indeed, it took extremely elaborate reasoning to establish that the Commission had any power whatever under the 1934 Act even to *find* that a rate should be higher than that stated in the contract. *Air-Mail Compensation*, 206 I. C. C. 675, 688-694.

In August 1935, however, the statute was radically amended. It was made clear that the Commission could increase as well as decrease the contract rates.[67] Furthermore the *August* amendment provided that contracts in force on March 1, 1935, or let and satisfactorily performed for certain periods thereafter, should be continued indefinitely, "and compensation therefor, on and after *March* 1, 1935, during such period of indefinite continuance, shall be paid at the rate fixed by order of the Commission." 49

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[66] From a consideration of "the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources . . . and other material elements" the Commission was to fix rates for each route "designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom." §6(e), 48 Stat. 936. This provision was amended in 1935 to require the Commission to disregard losses resulting from the unprofitable maintenance of non-mail schedules. 49 Stat. 616.

[67] Thus, §6(e) of the statute was amended to provide that if the holder of a contract contended "that the rate of compensation in force for the service involved is insufficient, the burden of establishing such insufficiency and the extent thereof shall be assumed by him." Act of August 14, 1935, 49 Stat. 616. Likewise §6(c) was amended to delete the provision that contracts should be continued "subject to any reduction in the rate of payment therefor." 49 Stat. 617.

Stat. 617. "This was clearly a retroactive application of rates, which goes much beyond a mere publication of rates as of the date of an application of such subsequent date as the rates brought in issue by the application became unfair and unreasonable." *Air Mail Compensation*, 222 I. C. C. 602, 606.

Before enactment of the 1935 amendment, the Commission had made findings as to the rates for all except two of the domestic routes. After the amendment, air mail pay was adjusted retrospectively back to March 1, 1935, at the rates so fixed.[68] Rates on the other two domestic routes were not determined until after the amendment. In both instances the Commission fixed rates which were higher than the contract rates, effective retrospectively to March 1, 1935, although the proceedings had been begun after that date.[69]

Few cases arose involving requests for readjustment of rates previously fixed by the Commission. It was held that on reexamination rates could be increased not merely prospectively but retrospectively to the date of the application

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[68] See, *e.g.*, *Chicago & Southern Air Lines, Inc., Rate Reviews*, 223 I. C. C. 535, 536; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 510; *Air Mail Rate for Route No. 2*, 221 I. C. C. 229, 231.

[69] In *Air Mail Rates for Route No. 31*, 214 I. C. C. 387, the proceeding was begun on March 21, 1935. In *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, the proceeding was begun on July 22, 1935. In the latter case Commissioner Mahaffie (who had not sat in the former case) dissented on the ground that he could "find nothing in the law under which we operate that authorizes us to prescribe compensation retroactively" (p. 403). In 1937 the Post Office was still declining to give any retrospective effect to the Commission's finding. *Inter-Island Airways, Limited, Rate Reviews*, 225 I. C. C. 115, 117.

for reexamination.[70] It was never held that rates could not be adjusted retrospectively to a time antedating the petition for reexamination. In three cases, airlines sought to have rate increases made effective earlier than the time of the application for reexamination. In each case they had a hearing on the merits. The requests were denied on the merits, not for lack of power.[71] The Commission actually

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[70] Here too Commissioner Mahaffie dissented. His argument was that the decision in the *New York Central* case under the Railway Mail Pay Act was inapplicable because airlines—unlike railroads— were not obliged to carry mail. *Air Mail Compensation*, 216 I. C. C. 166, 192. On appeal to the full Commission, this decision was sustained by an 8 to 2 vote, with only Commissioners Mahaffie and Lee dissenting. *Air Mail Compensation*, 222 I. C. C. 602, 610. The Post Office Department never attempted to test the point in the courts (as it had done in the *New York Central* case, by declining to pay on the basis of the Commission's findings), but Commissioner Mahaffie continued to dissent thereafter. *Air Mail Rates for American Airlines, Inc.*, 225 I. C. C. 12, 46; *Air Mail Rates for Braniff Airways, Inc.*, 226 I. C. C. 752, 768; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 516; *Air Mail Rates for Route No. 26*, 229 I. C. C. 373, 383; *Air Mail Rates for Route No. 29*, 229 I. C. C. 623, 632; *Air Mail Rates for Route No. 2*, 231 I. C. C. 229, 250; *Air Mail Rates for Route No. 13*, 231 I. C. C. 673, 683.

[71] "As previously stated, petitioner seeks to have the findings herein made effective from May 1, 1936, prior to the date its petition was filed. In *Air-Mail Compensation*, 216 I. C. C. 166, the rates found fair and reasonable for routes nos. 3 and 16 were, for the reasons there stated, made applicable from the date of filing of the petition. *This record affords no basis for any different conclusion*, especially, in view of the fact that the relief sought will, in part at least, be obtained through the proper application of the order in *Air Mail Compensation, supra*, during the period prior to the date of filing the petition." *National Parks Airways—Base Rate Mileage*, 220 I. C. C. 149, 154.

". . . there is no indication *on this record* that any modification of the base rate formerly determined and fixed as fair and reasonable is warranted." *Boston-Maine Airways, Inc., Base Rate Mileage*, 229 I. C. C. 343, 350.

"We find that the rates of compensation for the transportation of air mail by airplane and the service connected therewith over air

made, however, such a retrospective increase in a case involving nearly all the airlines.[72] It also decreased rates

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mail route 6 *have not been shown* to be unfair and unreasonable." *Air Mail Rates for Route No. 6*, 229 I. C. C. 357, 369-370.

[72] An order issued in 1935 in *Air-Mail Compensation*, 206 I. C. C. 675, established a sliding scale of rates for all but two of the domestic routes. As pointed out in *Air Mail Compensation*, 222 I. C. C. 602, 608, it was recognized that this "might result, in some individual instances, in a carrier receiving higher compensation for performing a given number of miles of service than it would have received for performing a greater number of miles, but there then seemed to be little probability of such a result in broad application of the scale. Since that time, however, the inauguration or cessation of partial schedules and changes in route mileages have resulted in such situations with increasing frequency." Consequently, in 1937 the Commission changed its order so as to include a retrospective proviso "to the effect that the compensation payable under any rate determined under the scale should not exceed the minimum compensation payable under the next lower rate so determined." *Air Mail Compensation*, 222 I. C. C. 602, 608. Commissioner Mahaffie dissented. The effect of this proviso was to reduce the compensation considerably. (For details, see the comparative chart in *Air Mail Compensation*, 232 I. C. C. 608, 615.) The Postmaster General regarded the proviso as effective as of March 1, 1935, and required "substantial refunds from the carriers" back to that date. See *Air Mail Compensation*, 232 I. C. C. 608, 610; *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12. Thus the compensation was reduced retrospectively.

Later in 1937 the Commission reopened the proceedings as to all airlines, after one had protested. It ultimately vacated the proviso and inserted a new one. "We have authority upon our own motion to correct an error in our former findings and to make such finding in the form of an amendment to our original findings and order." *Air Mail Compensation*, 232 I. C. C. 608, 613. Once again Commissioner Mahaffie dissented. Under the new proviso the airlines received even more than under the original 1935 order. 232 I. C. C., at p. 615. Here again the Postmaster General readjusted compensation back to March 1, 1935. See *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12. Thus the increase was also retrospective. During this second readjustment of compensation, it appeared that one of the airlines "had been overpaid

retrospectively to a day antedating the start of the rate review proceeding.[73]

D. The Changes Made by the Civil Aeronautics Act

The Civil Aeronautics Act of 1938 completely revolutionized the status of the airlines and the nature of mail pay. Congress concluded that air carriers subserved national interests of far greater importance than cheap postal service, and that air mail pay should be the means of developing the infant aviation industry to effectuate those interests. Hence Congress enunciated a "new national policy" to foster "the continued development of an air transportation system adequate to the paramount national needs, not only of the postal service but also of our commerce and our national defense." *Chicago & Southern Air Lines, Inc.—Mail Rates for Routes Nos. 8 and 53*, 3 C. A. B. 161, 191.

No longer were airlines free to withdraw from their obligation to carry mail. They were compelled to carry the mails, §§401(k), (m), (n), 49 U. S. C. §§481(k) (m), (n), and §902(a), 49 U. S. C. §622(a). Necessarily they were afforded just compensation as a matter of right, §§401(m) and 406(a).

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during the period from March 1, 1935, to the date of the last order; the Post Office Department collected this excessive compensation by withholding certain sums from current payments until the sum was restored." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12.

[73] See note 72 *supra*. The Commission consistently reviewed operations for periods antedating the proceeding for revision, *e.g.*, *Wyoming Air Service, Inc., Rate Review*, 225 I. C. C. 1; *Western Air Express Corp. Rate Review*, 225 I. C. C. 743; *National Airways, Inc. Rate Review*, 226 I. C. C. 409; *Hanford Airlines, Inc. Rate Review*, 227 I. C. C. 593, but actually lowered its rates only in the instances mentioned in note 72.

Congress abolished the former system under which both the Post Office and the Commission had "authority over the compensation to be paid for the transportation of air mail."[74] Instead a new agency was created to devote its exclusive attention to the subject of air transport and given wide latitude to adjust mail rates.

Provisions designed to hold mail pay as low as possible, so that it would not exceed postal revenue, disappeared.[75] The voluntary contract system—under which airlines would bid nominal rates in order to obtain certificates to operate[76] —was eliminated. Ceilings on maximum rates were removed. Mail pay was no longer to be computed on a narrow *quantum meruit* basis. It was to be ample enough to enable the airlines to "maintain and continue the development of air transportation to the extent and of the character and

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[74] *Subcommittee Hearings*, pp. 40, 42. The Commission had frequently pointed out the undesirable effects of the "divided authority over the compensation to be paid for the transportation of air mail." *50th Annual Report of the Interstate Commerce Commission* (Nov. 1, 1936), p. 31; *51st Annual Report of the Interstate Commerce Commission* (Nov. 1, 1937), p. 39.

[75] The Commission had pointed out the difficulty of determining the postal revenue from air mail (*Statutory Maximum Mail Rates*, H. Doc. No. 141, 75th Cong., 1st Sess., p. 10), that "unless a phenomenal increase occurs in the revenue from air-mail postage by 1938, compensation measured by rates confined to such revenue would not enable the carriers to operate the present class of mail service, if it would permit them to operate at all" (*50th Annual Report of the Interstate Commerce Commission* [Nov. 1, 1936], p. 31), and that there "is, of course, no necessary relation between the reasonable compensation paid for the transportation of the mail and the revenues received by the Government from the public for such service" (*51st Annual Report of the Interstate Commerce Commission* [Nov. 1, 1937], p. 34).

[76] See, *e.g.*, *Transcontinental & Western Air Mail Bid*, 223 I. C. C. 281, involving a bid to carry mail at 1 mill per airplane mile.

quality required for the commerce of the United States, the Postal Service, and the national defense," §406(b). The mail provisions of the Act "enacted the policy of governmental financial aid to the air lines."[77]

Likewise the rate-making procedure under the earlier acts was completely overhauled. Congress struck out the provision that rates should remain in effect until changed. It dropped the requirement that six months had to elapse before mail rates could be "reexamined." The newly-created Board was "empowered" to review rates at all times, §406(a). A petition for a rate had to state the rate believed fair, §406(c).

Nor did Congress leave the development of air transportation to the voluntary action of the airlines. The Board was not to be a passive umpire between the Post Office and the airlines, sitting with folded hands until it was petitioned to act. Congress did *not* allow the Board "to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief" (87). By §406(a)(1) it not only "empowered" but "directed" the Board to take action "upon its own initiative." It placed on the Board the independent responsibility of effectuating the legislative purposes stated in §2 and §406(b), whether the airline acted or not. "Our *obligation* is to see to it that the rates he [the Postmaster General] pays are *at all times* sufficient to enable the carriers to accomplish and maintain those purposes." *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 330. By the same token, Congress gave the Board full

[77] *Survival in the Air Age*, Report of the President's Air Policy Commission (Jan. 1, 1948), p. 100.

power to effectuate those purposes when the carrier did act.

Thus Congress swept away whatever restrictions existed under earlier laws to hamper the flexible adjustment of mail pay. Limitations on the power to make retrospective rate increases might be appropriate in statutes primarily concerned with keeping the cost of postal operations low. They would only defeat the broad national objectives of the new Act. ". . . when Congress wants to give wide discretion it uses broad language." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 616. In §406(a)(1) it conferred the widest discretion by using the broadest possible words. The Board was "empowered and directed . . . to make such rates effective from such date as it shall determine to be proper."

E. The "Legislative History" of Section 406(a)(1)

The only valid legislative history of §406(a)(1) appears in the Conference Report issued in June 1938, 16 days before the Act was approved.[78] The "make effective" language had been suggested in the spring of 1937 during hearings on a bill which was not enacted into law.[79] The witness proposing it, Mr. Gorrell, representing the Air Transport Association, told a Senate subcommittee: "the

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[78] See p. 45, *supra*.

[79] Two bills were under primary consideration by the Senate subcommittee, S. 2 and an amendment thereof. (Similar bills were introduced in the House.) Section 311 of the original S. 2, printed in *Subcommittee Hearings*, p. 9, was modified in several respects by the amendment, and §310(d)-(i) of the amendment, printed in *Subcommittee Hearings*, p. 28, conforms much more closely to the present Act. Practically everybody agreed that the amendment was preferable and it was the chief subject of discussion in the hearings. When we refer to the "1938 bill," we shall mean amended S. 2.

present authority of the Commission to fix appropriately the effective date of its rate decisions is . . . specifically preserved."[80] This sentence was relied on by the Board (74-76) and the Court below (113) as the keystone of an argument that Congress intended the Act to be construed to permit rate increases retrospectively only to the filing date of the proceeding. The contention is groundless.

The Board's argument proceeds about as follows. (a) Under the Air Mail Acts of 1934 and 1935, there was a disagreement whether rate changes could be made effective back to the institution of a proceeding. (b) The bill under consideration in 1937 contained provisions "practically identical" with those in the Air Mail Acts. (c) Therefore that disagreement was bound to be perpetuated if that bill was passed. (d) No other disagreement as to the Commission's power existed; the implication is that it was settled that a rate change could not be made effective as of a day antedating the proceeding. (e) Recognizing that this one point of disagreement would persist, and solely to resolve it, Mr. Gorrell suggested the "make effective" language and (f) it was added to the bill for the same limited purpose. (g) Consequently, despite its palpably broader language, it must be given a meaning limited by the narrow disagreement which alone it was designed to resolve. (h) When Congress passed the Act in 1938, over a year later, it had all this past history in mind—although no one referred to it. (i) Therefore the clear words of the Act must be interpreted to mean something less than they say.

This argument is unsound from start to finish.

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[80] *Subcommittee Hearings*, p. 525. See also *Hearings before House Committee on H. R. 5234 and H. R. 4652, 75 Cong., 1st Sess.*, p. 408.

Admittedly there was disagreement within the Commission on the question of retrospective rate-making. Commissioner Mahaffie dissented from every decision changing rates retrospectively. The disagreement was not limited to the narrow question whether the Commission could change rates retrospectively to the date the proceeding was begun, but no earlier. Nor would a disagreement on that narrow question have been perpetuated if the 1937 bill were passed. For it simply is not true that the 1937 bill contained provisions practically identical with those contained in the Air Mail Acts.

For one thing, the rate-making provisions of the 1937 bill were entirely different from those of the Air Mail Acts.[81] All the "minutiae of expression . . . that show

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[81] Section 308(d) of amended S. 2 provided (*Subcommittee Hearings*, p. 28):

"(d) The Commission is empowered and directed, upon its own initiative, or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, and the facilities devoted to and services connected therewith, by each holder of a certificate authorizing the transportation of mail by aircraft; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft: *Provided further*, That the Commission shall as soon as practicable initiate proceedings under this section to fix such rates for air carriers to which payment at the former contract rates is authorized and shall decide all such proceedings as speedily as possible."

The changed standards to be considered in fixing rates were contained in §304(c), *Subcommittee Hearings*, p. 22.

Congress to have been thinking of the future,'"[82] which were carried over bodily into the Air Mail Acts from the Railway Mail Pay Act, were eliminated.[83] More important, the 1937 bill—unlike the Air Mail Acts—obligated airlines to carry mail.[84] Commissioner Mahaffie's disagreement with the majority of the Commission, when it held that power existed under the Air Mail Acts to make rates effective back to the start of proceedings, was wholly predicated on the ground that no obligation to carry mail was imposed by those statutes.[85] The 1937 bill imposed that obligation. Once carriage of mail became the statutory duty of the airlines, no doubt could remain as to the existence of that power in view of this Court's holding in *United States* v. *New York*

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[82] *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.

[83] For instance, rates were no longer to be fixed "by order" which was to "continue in force until changed." More important, the provision permitting "reexamination" of an order only after a 6-months waiting period was eliminated, and the Commission was "directed" to act at all times "upon its own initiative."

[84] See §305(g), *Subcommittee Hearings*, p. 23, and §316(a), *ibid.*, p. 31. For the corresponding provisions of the original S. 2, see §§305(h)(1) and 305(n), *ibid.*, pp. 4 and 5.

[85] In *Air Mail Compensation*, 216 I. C. C. 166, 192, Commissioner Mahaffie, dissenting, stated:

> "For the power to require a retroactive increase in the compensation of the applicant the majority rely greatly on the decision of the Supreme Court in *United States* v. *New York Central*, 279 U. S. 73. That decision was based on the fact that carriage of the mail by railroads is required by law. Refusal is punishable by a fine. Because the service is compelled, the constitutional rights of the railroads were considered of importance. Here we have a very different situation. The air mail is carried by contractors. The air line is under no legal compulsion to become a contractor. It may, on 60 days' notice, terminate its contract, and end its undertaking to carry mail."

Central Rd. Co.—whether or not the "make effective" clause was added. Plainly, therefore, the one point of disagreement on which the Board's argument is focussed would *not* have been perpetuated had the 1937 bill been passed without the "make effective" clause.

But the errors in the basic premise of the Board's argument go even deeper. It is not correct to say that the *only* point of disagreement was whether retrospective changes could be made back to the start of the rate proceeding. Nor is it correct to imply that it was settled, under the Air Mail Acts, that a rate could not be changed retrospectively effective as of any earlier day. No case under the Air Mail Acts ever held or said that.[86] On the contrary, in certain instances where such retrospective changes were deemed appropriate, the Commission actually made them—and those changes also elicited dissents by Commissioner Mahaffie. For instance, he dissented when a contract rate was increased—on the supposed authority of the 1935 amendment—retrospectively back to March 1, 1935, which was months earlier than the start of the rate proceeding.[87] In short, he subscribed to the broad principle that the Commission had no power whatever to make any retrospective rate change. And, as the hearings on the 1937 bill show, it was that entire broad principle which was under consideration

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[86] *Cf.* note 71, *supra.*

[87] See *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, *supra* note 69. Likewise Commissioner Mahaffie dissented in *Air Mail Compensation*, 222 I. C. C. 602, where the Commission amended a 1935 order by a proceeding begun in 1937, so as to insert a proviso which had the effect of reducing rates from 1935, and in *Air Mail Compensation*, 232 I. C. C. 608, where it amended the order again and struck out the proviso. These decisions are digested more fully in note 72, *supra.*

The background of the hearings is illuminating. The major issue at the time was whether air transportation should be regulated by the Post Office, the Interstate Commerce Commission or a new agency devoted solely to aviation. While it was generally agreed that the divided responsibility which existed was undesirable, and that one body should control the industry, there was no agreement on which body. The proponent of the 1937 bill—Senator McCarran—favored a new, independent agency.[88] The President and many other persons favored the Interstate Commerce Commission.[89] In deference to the President's wishes, the 1937 bill would have reposed control in the Commission.[90]

The Post Office Department felt that control over air mail should rest largely with it.[91] Therefore it and its champion, Senator McKellar, vigorously opposed the 1937

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[88] Senator McCarran's very first bill, introduced in 1934, proposed a separate commission. It would have had power under §10(a) "to fix and determine from time to time the fair and reasonable rates and compensation" and under §10(b), "from time to time revise the same in such manner as at all times to return a fair and just compensation to the carrier operating said route or routes and as may be necessary to maintain and insure necessary and adequate transportation of passengers, mail, and property, and all services incident thereto." 78 Cong. Rec. 7617. The bill was objected to on the grounds that a new commission should not be created, and the industry was still too young to have its passenger and freight rates regulated in addition to its mail rates. 78 Cong. Rec. 7623. It was defeated by a 46 to 26 vote in the Senate. 78 Cong. Rec. 7628.

[89] The advisory Federal Aviation Commission created by the 1934 Act recommended creation of an Air Commerce Commission, but the President disagreed. See Sen. Doc. 15, 74th Cong., 1st Sess., p. 39; and the President's message of transmittal, p. iv.

[90] *Subcommittee Hearings*, p. 46.

[91] *Ibid.*, pp. 107 ff.

bill.[92] They proceeded to attack the Commission's administration of the existing statutes on a broad front. The attack was designed to show that the Commission should not be entrusted with control over air mail. Charges and counter-charges of all sorts were made.[93]

During the course of the hearings, the views of Commissioner Mahaffie—who had held out against all retrospective rate changes—were aired by the Solicitor of the Post Office in response to questions. Senator McKellar brought out that the Commission had established "retroactive" rates.[94] "On what possible theory," he inquired, "or what possible

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[92] Senator McKellar was chairman of the Senate Committee on Post Offices and Post Roads. Some months before the hearings he had castigated the Commission, accusing it of "willful defiance of the Congress." "The Interstate Commerce Commission fixes the rates on air mail. With respect to three companies they not only fixed the rates but they antedated them." 81 Cong. Rec. 629.

[93] For example, the Commission was charged with being too liberal in increasing air mail pay, and too reluctant to reduce it (*Subcommittee Hearings*, pp. 116, 122, 160-161). A list was submitted showing that rates had been raised on most routes, and decreased or left unchanged on relatively few (pp. 129-135). So also, the Commission was charged with not making a proper investigation and audit before increasing rates and not disclosing the evidence on which it based its findings (pp. 163, 172-174), of failing to disclose "upon what basis any of the rates have been fixed" (pp. 168, 171), of employing a man "unduly friendly to the air-mail companies" (p. 167), and of differentiating unduly between the rates given to competing airlines (pp. 169-170).

On the other hand, the Post Office was charged with permitting an unlawful consolidation of two airlines (pp. 112-115) and threatening to withdraw mail schedules if the Commission increased rates (pp. 116-118). At one stage the Solicitor for the Post Office plaintively remarked "We are both defendants" and Senator Truman replied, "We are not prosecuting anybody, Judge; we are trying to get the facts" (p. 118).

[94] *Subcommittee Hearings*, p. 179.

claim of law were retroactive rates established?"[95] The answer elicited the reply that "Commissioner Mahaffie in one case wrote a dissenting opinion holding that the Commission did not have the right to go back and fix rates retroactively, but the majority held that they did have that right, and those rates were fixed retroactively, and are retroactive."[96]

Testimony was elicited that the Commission went back to "different dates. The first date the payments were adjusted was to March 1, 1935, I believe. In the last cases they were fixed back to the filing of the application."[97]

> "Senator McKellar. *In the first one, did they go back further than the application?*
>
> "Mr. Crowley. *Yes, in the first case they went back, I think, to the first day of March 1935.* Of course, I do not want to misquote the Commission, you understand.
>
> "Senator McKellar. Oh, no.
>
> "Mr. Crowley. But I think it went back to the 1st day of March 1935.

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[95] *Ibid.*

[96] *Ibid.* For Commissioner Mahaffie's dissenting opinions, see *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, 402, digested *supra* note 69, and *Air Mail Compensation*, 216 I. C. C. 166, 192, mentioned *supra* note 70.

[97] *Subcommittee Hearings*, p. 179. The Post Office had already submitted a schedule showing that in a proceeding instituted on July 22, 1935, the Commission "increased the bid rate of 19-1/2 to 25 cents per airplane mile retroactively to March 1, 1935." *Ibid.*, p. 130. The proceeding referred to was *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, discussed *supra* note 69, where Commissioner Mahaffie had dissented on the ground that the act did not permit the Commission to fix rates "retroactively." This proceeding was referred to later by Senator McKellar as an example of how the Commission allowed "retroactive rates." *Subcommittee Hearings*, p. 291.

"Senator McKellar. Had the act been passed at that time?

"Mr. Crowley. No.

"Senator McKellar. They went back, even, before the passage of the act?

"Mr. Crowley. Yes, sir.

"Senator McKellar. *Did you protest against the creation of retroactive rates?*

"Mr. Crowley. *Yes, sir.*"[98]

Repeatedly, therefore, Senator McKellar tried to show that the Commission had no "right to make their acts retroactive in fixing rates."[99] And the proponent of the bill, Senator McCarran, countered this broad attack on an equally broad front. He endeavored to show that this court had sustained "retroactive rate decisions."[100] "In other words, that establishes the *principle* of the propriety of a retroactive decision."[101] Testimony was elicited to show that Congress itself had empowered the Commission to fix rates "retroactive from August 1935 to March 1, 1935."[102] Mr. Gorrell discussed at length "the power of the Interstate Commerce Commission to make a retroactive award."[103] He contended vigorously that it existed, and even argued that the Post Office itself had actually acquiesced in a decision in which the rate was increased back to the date when the petition was filed.[104]

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[98] *Subcommittee Hearings*, p. 179.

[99] *Ibid.*, p. 239; see also p. 291.

[100] *Ibid.*, p. 180.

[101] *Ibid.*, p. 343.

[102] *Ibid.*, p. 230.

[103] *Ibid.*, p. 483.

[104] *Ibid.*, pp. 484-485. "There is no provision in the Air Mail Act forbidding a retroactive order" (p. 484). "It is apparent, from

Later Mr. Gorrell proposed the "make effective" clause and said that "the present authority of the Commission to fix *appropriately* the effective date of its rate decisions is likewise specifically preserved."[105] Manifestly his proposal was responsive to the broad question on which Commissioner Mahaffie had consistently differed with the majority of the Commission and which Senator McKellar had raised—did the Commission have *any* authority to change rates retrospectively? The whole debate was over the general "principle of the propriety of a retroactive decision."

There is not the slightest reason to suppose that Mr. Gorrell or anyone else thought that the authority to "make such rates effective from such date as it shall determine to be proper" was to be limited by the date of the start of the rate proceeding. The hearings had already developed the fact that rates had been changed retrospectively back of that date. Nobody had suggested that the Commission then had —or should be given—limited power to set rates retrospectively back to the filing date of a proceeding but no further.[106] Certainly there is nothing to show that even as

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an examination of the Air Mail Act, that Congress intended, first, that the carrier should have fair and reasonable rates at all times and second, that the Commission should have the power to see that such rates were granted" (p. 484). "Moreover, the acquiescence of the Post Office Department, as thus referred to, was entirely just and right because there is *no substantial doubt* but that the Commission is empowered to put a rate order in effect as of the date when the Commission has been formally advised an unjust rate then and there existed" (p. 485).

[105] *Ibid.*, p. 525.

[106] *Cf. American Stevedores, Inc.* v. *Porello*, 330 U. S. 446. There the question was whether a statute permitted suit for personal injuries as well as injury to property. The Representative proposing the bill stated that it "simply allows suits in admiralty to be brought

early as 1937 any member of Congress so interpreted the "make effective" amendment. It was not referred to in either of the 1937 Committee reports,[107] or in the debates in the Senate on the amended bill.[108] "The interpretation of statutes cannot be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61.

Moreover, the 1937 bill was not passed. It never even came to a vote. It was greatly recast in 1938, and control

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by owners of vessels whose property has been damaged" and that "where a man's property is damaged, he can bring a suit." He said nothing about suits for personal injuries. This Court disregarded these remarks. "These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions" (pp. 451-452).

[107] Below the Board tried to derive some solace from one sentence in *H. R. Rep. 911, 75th Cong., 1st Sess.*, p. 18: "Rates for the carriage of air mail would be fixed by the Commission in the same *manner* as the Commission now fixes the air-mail rates for all domestic air-mail carriers." Manifestly this generality, which summarized the entire rate-making section, with its specification of the "aircraft-mile, pound-mile, weight, space" and other methods of computing rates, was totally unrelated to the specific problem here at issue.

[108] Describing the 1937 bill, Senator Truman said (81 Cong. Rec. 9202):

> "It follows exactly sections 1 and 2 of the Interstate Commerce Act so far as they can be applied to air transportation. Every feature of the bill is intended to regulate air carriers strictly in the public interest. That part of the bill which refers to air mail treats air mail just as mail on railroads is treated. Section 304(a), 305(f), 305(g), and 305(m), and all of Section 311 are devoted exclusively to the mail, and control and regulation of the mail is left completely in the hands of the Postmaster General."

Plainly this general resume did not even begin to approach the specific language of the "make effective" clause. The Senate never discussed the specific provisions of any part of the air mail sections of the bill.

over air mail was given to a new Authority, rather than to the Commission. There is nothing to show that Congress, when it passed the Act in the summer of 1938, saw in §406(a)(1) those nuances now attributed to Mr. Gorrell when he testified in the spring of 1937. No member of Congress ever referred to his testimony. Congress took the language at its broad face value. See the *Conference Report*, quoted *supra*, p. 45.

Had Congress wished to codify such power as existed under the Railway Mail Pay Act, it had only to copy its rate-making provisions and impose on airlines, like the railroads, the obligation to carry the mails.[109] Instead it changed the words of the earlier acts radically by patently broader language. Had it wanted to limit the Board's power to adjust mail pay retrospectively to the filing date of the rate proceeding, it would hardly have used the sweeping—and what the Board is now pleased to call the "ambiguous"—language of §406(a)(1). All it had to do was to copy the language used in other parts of the Act (*supra*, p. 19). It did nothing of the sort.

"The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained

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[109] That obvious procedure was stressed by Commissioner Eastman when testifying in 1937 (*Subcommittee Hearings*, p. 70):

> ". . . you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to motor carriers. That, I think, is a desirable thing, because when language has been interpreted once it is desirable to have it used again, thus avoiding many questions always arising with respect to the employment of new language. But, as I say, these bills follow the usual pattern. At the same time, there are certain important differences between them which I shall mention."

Among the differences mentioned were those between the bills and "the present railway mail pay acts" (p. 74).

processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260. The legislative history of the Act only confirms the fact that §406(a)(1) means just what it says. Congress departed from the wording of earlier, restrictive legislation. Drawing a unique statute, it used in §406(a)(1) unique language of a breadth consonant with its broad purpose to foster the development of commercial aviation "until it reaches such stature in passenger and cargo capacity as to constitute in crisis an adequate logistical air arm of the National Defense Establishment." *Report of the Congressional Aviation Policy Board* (Mar. 1, 1948), p. 5. That language should not be whittled down by a construction which ignores these objectives.

POINT V

The decision below thwarts the basic policies of the Act and defeats the airlines' constitutional right to just compensation.

1. The Court below was largely influenced by the "result which would ensue if the statute were given unlimited retroactive effect" (114). But no one suggests that the Board must examine rates "back to 1938" (81), or that it is required to reexamine determinations of mail compensation based on past *facts* which it has once reviewed. It does have full power to examine its rate *prophecies* in the light of actual facts, developing thereafter, which it has never reviewed.[110]

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[110] As shown by *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 598-602, where parallel problems recur in several years a determination as to one year, based on findings of fact for that

"'No rate order,' the Court argued, 'would be final'" (114). On the contrary, every rate order would be final to the extent that it determined compensation for the period prior to the order. And there is nothing in the Act which demands "finality" in any other sense. Indeed, the Act is concerned not with "finality" but flexibility of rates.

The Act does not talk about "final" rates at all. There is no period during which a future rate necessarily will be "final" in the sense of being certain to remain in effect unchanged. Unlike the situation under the Railway Mail Pay Act, under which a rate cannot be reexamined for six months, there is no period during which the Board's future rates are frozen and incapable of being changed.[111] The Act permits a new rate proceeding to be instituted at any time.

Thus, on March 1 the Board may fix a prospective rate to take effect on March 2. A new proceeding to change that

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year, cannot be reviewed again. It is final for that year. That determination does not operate, however, to preclude a review for later years, even though the questions involved are identical, when different or changed facts are involved; "where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive" (p. 600).

[111] The inelasticity of the Railway Mail Pay Act may be inconsequential in the well-established, stabilized railroad industry. But it was recognized when the Act was passed that the "air-transport industry is a comparatively new field of endeavor. Its operations are restricted by weather conditions and other factors, and are subject to more violent financial uncertainties than those of transportation enterprises generally. Moreover, changes in operating conditions are frequently required by governmental regulations and the rapid development of the art of air navigation." *Western Air Express Corp. Rate Review*, 225 I. C. C. 743, 753. "At the time of the passage of the Civil Aeronautics Act the financial condition of the air-transport industry can fairly be described as chaotic." *First Annual Report of the Civil Aeronautics Authority* (1939), p. 20. It is not surprising that, in the Act, Congress abandoned any attempt to freeze air mail rates for any period of time.

rate can be begun on March 2. While that proceeding is pending, and until the Board sets a new rate, mail compensation will be paid on the basis of the rate set March 1. Admittedly, however, the Board has power in the new proceeding to fix a different rate retrospectively effective as of March 2. In that event the accounts between the Post Office and the airline must be adjusted back to March 2. The prospective rate fixed on March 1 will never have been "final" in the sense of having been immune from revision for any period of time.[112] Thus the supposed "finality" of a rate can be destroyed by filing a petition the day after its issuance.[113]

Once a future mail rate is fixed, therefore, it is "final" only in the sense that until it is adjusted it governs the action of the airline and the Post Office. Importing inflexible notions of "finality" into the Act would only

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[112] *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 363, recognized that even a public utility rate system can provide for "provisional rates" where "the will to make them provisional" is written into the statute. "The essence of such a system is that under it rates can be 'experimentally laid down and experimentally tried out.' Hutcheson, J., in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443, 447." "In our opinion, the terms of the Act are notice of the intent of Congress that the carrier's needs be examined from time to time in accordance with the standards prescribed by the Act and that its mail rates be fixed accordingly." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 332.

[113] Moreover, the Board can always destroy the "finality" of its future rates by terming them "temporary," as it does time and again. In 1942, the Board proposed that during the war all future rates "should be temporary in character." See *infra* pp. 99-100. As already seen, it frequently establishes avowedly "temporary" rates for years at a time. See *supra* notes 45 and 46, and *infra* note 124. Unless there is some magic in nomenclature, and labels—rather than realities—are to control, it is apparent that the "finality" which the Court below sought is illusory.

frustrate the Congressional policy to afford the Board ample power "to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier . . . according to the needs of the particular case."[114]

2. The Court feared that the power to increase mail rates retrospectively necessarily implied the power to redetermine rates for past periods "when the carrier has made more than an adequate profit" (114). There is nothing to fear in this implication. The decision whether or not rates should be adjusted retrospectively—upward or downward—has been left to the Board to determine upon the facts. Recognition of the existence of the power does not imply that the Board may arbitrarily abuse it. The Board may determine to increase an airline's compensation for a past period when its rates have proven to be unduly low. That result carries out the basic policy of the Act to accord the airline mail pay sufficient to enable it at all times to carry out the statutory objectives. It does not, however, follow that the Board may compel the airline to return mail compensation in excess of the amount sufficient to achieve these objectives when it finds that such an action would not fulfill the Act's purposes.

It is curious to find the Board urging an arbitrary limitation on its power to protect the Government against the effects of an erroneous rate prediction in order to justify its supposed inability to give the airlines relief.[115] The Act was

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[114] See the Conference Report on the Act, *supra* p. 45.

[115] Contrast the claim of the Federal Power Commission that it should have the power to find that certain past public utility rates were too high even though admittedly it had no power to fix those rates. *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618.

designed to work even-handed justice, not even-handed injustice. There is no reason to deny the Board the power to render full justice to the airlines because it would then be able to accord full justice to the Government. Far from sustaining the limitation for which the Board contends, the argument only emphasizes its unsoundness.

We see no reason to deny that the Board has power, in appropriate cases, to find that excessive amounts have been paid for carrying the mails, however seldom that power may be exercised as a matter of sound discretion. To be sure, there are overwhelming economic and policy considerations which ordinarily make it undesirable to attempt to reduce mail pay retrospectively. It may be most unwise to subject an airline to liability to return money which it has disbursed by a "dividend declaration" (upon which taxes have already been paid by it and its stockholders), or on the faith of which it has entered into a "large commitment" or issued an "offering of securities" or otherwise changed its position (115). These and other considerations have led the Board in the past to decline to exercise any retrospective power over excessive mail rates.[116] But the *power* is not rendered non-existent in all cases because it might be abused in some cases.

Suppose, for instance, that a rate prediction is so hopelessly wide of the mark that an airline earns an unconscionably high profit from its mail pay. Assume, too, that the airline has made no disbursements and undertaken no commitments on the faith of that profit, which remains intact when the rate proceeding is begun. Why should not

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[116] *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 565; *Pan American Airways, Inc., et al., Latin-American Rate Case*, 3 C. A. B. 657, 669; *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 743; *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 776.

the Board have power to determine that the airline received far more than "reasonable compensation"?

The Board itself has asserted the power to determine, retrospectively, that excessive mail profits were received during the pendency of a rate proceeding.[117] Historically the Government was always able to recover past overpayments of mail pay, no matter "how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred."[118]

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[117] *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323. There the Board rejected (pp. 329-330) the argument made by the airline—advanced below by the *Board*—that because occasionally Congress specifically authorizes the recapture of excessive profits, it must be inferred that the Board may not determine that excessive mail pay was received. "Although the act does not in terms provide for repayment of any excess mail pay by the carriers, it does authorize the Board to make the rates it fixes effective from such date as it deems proper." *Annual Report of the Civil Aeronautics Board* (1942), p. 24. Of course no one contends that excessive profits derived from passenger or freight rates could be recaptured; the Act makes it plain that those rates can be changed only prospectively.

[118] *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, 121. The theory was that the balances for carrying the mail "although arising under successive quadrennial contracts" were "regarded as running accounts." See also, *United States* v. *Carr*, 132 U. S. 644; *Wisconsin Central Rd. Co.* v. *United States*, 164 U. S. 190. "Payment for transportation of the United States mail . . . by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." Act of September 18, 1940, c. 722, §322; 54 Stat. 955, 49 U. S. C. §66.

For other examples of the power to reduce mail pay retrospectively, to prevent injustice to the Government, see *supra* notes 6 and 72. Actually the Board itself has exercised that power. See *infra* pp. 90-96.

The Act was not designed to confer on airlines a vested right to retain unconscionable mail profits with impunity. It seems plain that the Board has the power to determine that excessive mail pay was received even if its proceeding does not get under way until after the windfall has occurred.

3. The Board's basic complaint was that "until a petition is filed by the carrier we have no notice that an existing rate is regarded as unsatisfactory, and we thus have no opportunity to take" appropriate action (87). That is no reason for denying the existence of power to take complete remedial action when the situation *is* called to the Board's notice—especially since the Board is directed to act on its own initiative regardless of whether the airline petitions it for relief. And there are compelling constitutional and statutory reasons why §406(a)(1) should not be vitiated by any consideration of supposed administrative convenience.

(a) "Rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. Section 406(a) was not enacted to serve the Board's convenience. It was essential to save the act from unconstitutionality. As the airlines are compelled to carry the mails, they are entitled to just compensation.

The Board argued that "a rate is constitutionally adequate if it affords a carrier an *opportunity* to earn a fair return" (88).[119] That is true only when the rate is initially set—when it is in the prophecy stage. When it ceases to

[119] The Board relied on public utility cases (69-70). Doubtless, when future public utility rates are framed, there is no constitutional requirement "that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the

be adequate in fact, it ceases to be constitutionally adequate, as is shown by *United States* v. *New York Central Rd. Co.*, 279 U. S. 73. A confiscatory rate is no less confiscatory because, when it was originally set, it was hoped that it would afford adequate compensation.

The Court suggested that an airline has a complete remedy under the Act to obtain the just compensation to which it is entitled. "This right is protected by the privilege accorded carriers to apply at any time for higher rates to compensate for *future* service to the Government."[120] But a procedure which merely affords a higher rate for future services does not remedy the insufficiency of the rate for past periods. And it is simply incorrect to imply that the Act—as construed below—affords the airline complete relief.

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losses and adding them to the rate base." *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 590. The Constitution does not require that future customers be forced to submit to unreasonably high rates because past rates proved too low, any more than it requires "the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future." *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U. S. 23, 32.

Entirely different, however, is the question whether a past rate should be adjusted retrospectively when it has proved confiscatory. For practical reasons, already noted, it is not feasible to have public utility rates retrospectively increased when experience proves them inadequate. "The Constitution as a continuously operating charter of government does not demand the impossible or the impractical." *Hirabayashi* v. *United States*, 320 U. S. 81, 104; *Yakus* v. *United States*, 321 U. S. 414, 424; *Bowles* v. *Willingham*, 321 U. S. 503, 515. It is entirely practical, however, to make a retrospective increase of air mail rates.

[120] *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, decided by the Court of Appeals for the District of Columbia on December 6, 1948, and not yet officially reported.

For one thing, it is impossible for an airline to know exactly when a rate becomes confiscatory. A confiscatory rate does not cease to be confiscatory, however, because it takes time for the airline affected—or the Board—to appreciate the fact. Moreover, as already seen (p. 21), it would be impossible for an airline to file its petition immediately even if it knew the facts. It is as if Congress had said—you have a cause of action to recover your just compensation, but the statute of limitations cuts off that cause of action the day it comes into being.[121] Hence, under the view of the Act adopted below, there will always be some period of time with respect to which the Board is powerless to grant relief, although the rate was confiscatory in fact.[122] Unless the Board has the power we

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[121] Although the legality of a statute of limitations "is unquestionable if a time reasonable, in view of the subject-matter, be given," *United States* v. *Morena*, 245 U. S. 392, 397; *cf. Anderson National Bank* v. *Luckett*, 321 U. S. 233, 242, 246, a statute of limitations is not constitutional if it bars all or part of a right at once, *Sohn* v. *Watterson*, 17 Wall. [U. S.] 596, 599, or if "the period limited be unreasonably short," *Edwards* v. *Kearzey*, 96 U. S. 595, 603; *Wilson* v. *Iseminger*, 185 U. S. 55, 62-63. "And it by no means follows that a legislature may establish an unreasonable limitation because it may establish a reasonable one." *Burrill* v. *Locomobile Co.*, 258 U. S. 34, 38.

[122] When property is taken for public use, the Government need not pay for it beforehand. See, *e.g.*, *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21; *Hurley* v. *Kincaid*, 285 U. S. 95, 104. It is necessary, however, that the right to obtain full payment be assured by some procedure "conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon." *United States* v. *Jones*, 109 U. S. 513, 519. The construction adopted below precludes the airline from being heard as to the fair value of its services for the full period that the old rate is claimed to be confiscatory. "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." *Bragg* v. *Weaver*, 251 U. S. 57, 59.

claim, a part of the airlines' constitutional rights is left unprotected. Plainly such an interpretation of the Act should be avoided. *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.

(b) Moreover, the purposes of the Act transcend any considerations of administrative convenience. By §406(a) Congress placed on the Board the duty to proceed "upon its own initiative." Quite correctly the Board has "conceived it to be its *duty* under the act to keep itself constantly informed of the status and development of all United States air carriers and in doing so to determine whether the total revenues received by such carriers were greater or less than the revenues required to enable them under honest, economical, and efficient management to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense."[123]

Hence Congress imposed on the Board the "obligation . . . to see to it that the rates" paid by the Postmaster General "are *at all times* sufficient to enable the carriers to accomplish and maintain those purposes." *American Airlines, Inc—Mail Rate Proceeding*, 3 C. A. B. 323, 330. It regarded the fostering of a strong commercial aviation industry as vital to national defense and polity. Mail pay

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[123] *Second Annual Report of the Civil Aeronautics Authority* (1940), p. 6. "The Authority believes that it has a duty under the statute not only to revise air-mail rates where such action is warranted by evidence submitted in formal proceedings instituted by the carrier, but also to act upon its own initiative and itself institute mail-rate proceedings where the facts indicate need for revision." *First Annual Report of the Civil Aeronautics Authority* (1939), p. 22.

was the device employed to enable the airlines to fulfill that purpose.

An airline cannot properly attain the legislative goal when its financial strength has been impaired because events have belied the Board's rate predictions. The Board must be able to accord the full relief needed to make good the impairment. If that relief involves the retrospective adjustment of past rate predictions, the Act confers on the Board full power to effectuate the purposes of Congress. We submit that the result reached below flies in the face of the clear words of the statute.

Conclusion

The order of the Court of Appeals should be reversed and the proceeding remanded to the Board for a hearing on the merits.

Respectfully submitted,

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Dated: New York, N. Y., January 14, 1949.

APPENDIX A

The Board has often fixed rates retrospectively as of a date prior to the institution of a rate proceeding.

In this Appendix we shall review the proceedings in which the Board has recognized or exercised the power to fix rates retrospectively to a date prior to the institution of a rate proceeding.[124]

A. The New Route Cases

Occasionally an airline has begun operating a new route without filing a rate petition. In such cases the Board has gone back of the date when the petition was filed and fixed a mail rate retrospectively, effective as of the time when operations started.[125]

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[124] See notes 19, 20 *supra*. Of course a "temporary" rate is frequently increased retrospectively to a date prior to the institution of the proceeding brought to change the rate. See, *e.g.*, *Northwest Airlines, Inc.*, Order No. E-721, July 29, 1947; *Florida Airways, Inc.*, Order No. E-765, Aug. 19, 1947; *Monarch Air Lines, Inc.*, Order No. E-898, Oct. 20, 1947; *Empire Air Lines, Inc.*, Order No. E-896, Oct. 20, 1947; *Florida Airways, Inc.*, Order No. E-897, Oct. 20, 1947; *Southwest Airways Co.*, Order No. E-899, Oct. 20, 1947; *Chicago & Southern Air Lines, Inc.*, Order No. E-1096, Jan. 5, 1948. In its opinion last adjusting TWA's domestic rates, the Board said it was establishing a "tentative rate," *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 602, but the magic word "tentative" or "temporary" did not appear in the order.

[125] *All American Aviation, Inc., Mail Rate for Route No. 49*, 3 C. A. B. 79 (route operated 4 months before proceeding begun); *United Air Lines Transport Corp., Mail Rate for Route No. 57*, 3 C. A. B. 381 (route operated 9 days before proceeding begun); *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61 (route operated 54 days before proceeding begun); *Caribbean-Atlantic Airlines, Inc. Mail Rates*, 6 C. A. B. 407 (route operated 27 months before proceeding begun); *Pioneer Air Lines, Inc., Mail Rates*, 8 C. A. B. 175 (route operated 20 days before proceeding begun).

The Board tried to justify this result on the ground of necessity. "Obviously when a new operation is commenced the question of mail compensation for that operation from its commencement must be decided" (81-82). Obviously some procedure should exist for affording the airline full compensation. Equally obvious, however, is the fact that such a procedure does exist in new route cases, without conjuring up some special power to set rates prior to the time when a petition is filed. All the airline need do, to obtain "compensation for that operation from its commencement," is to file a petition when it starts operations. Indeed, it can petition for a rate even before it has begun to operate.[126] Thus the attempt to distinguish the new route cases on the ground of supposed necessity is utterly unsound.

The Board noted that new route cases involve "no question of the retroactive revision of a final rate, since no rate at all was in effect for the new routes" (82, footnote 32). Quite recently it recognized that this argument was too broad and held that it made no difference that a rate *was* "in effect for the new route" all along.[127] But apart from

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[126] See, *e.g.*, *Mid-Continent Airlines, Inc.—Mail Rate for Route No. 18*, 2 C. A. B. 392; *Northwest Airlines, Inc.—Mail Rate Proceeding for Route No. 45*, 2 C. A. B. 827; *Trans-Texas Airways*, Order No. E-900 (Oct. 20, 1947); *Colonial Airlines, Inc., Bermuda Services Mail Rates*, Order No. E-1153 (Jan. 26, 1948); *Piedmont Aviation, Inc.*, Order No. E-1277 (Mar. 9, 1948). In fact, a so-called "permanent" rate can be—and has been—fixed even before operations have begun. See, *e.g.*, *Continental Air Lines, Inc.—Mail Rates for Route No. 43*, 1 C.A.A. 182, 189; *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 258. More recently, only a "temporary" rate has been established when operations have not yet started. See, *e.g.*, *Braniff Airways, Inc.*, Order No. E-966 (Nov. 10, 1947).

[127] In *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), a carrier was operating star routes prior to 1943, and receiving mail

the fact that the statute does not even talk about "final" rates (*supra*, pp. 75-77), the Act draws no distinction between the Board's *power* to make a rate retrospectively effective when it involves "revision of a final rate" and its *power* to make a rate retrospectively effective when no such revision is involved. In one case, the airline is made whole by retrospectively increasing its rate of compensation from an inadequate amount to a fair one; in the other, the increase is from another inadequate amount—zero—to the same fair rate.

Moreover, the Board has actually undertaken revision of what it is pleased to call "final" rate orders.

B. The "Nunc Pro Tunc" Petition Device

In May 1942 the Armed Forces took over many of the airlines' planes, and severe restrictions on service were imposed. To alleviate the resulting hardship, the Board issued two "general memoranda" to all airlines, which are set forth in full in the supplement to this Appendix. In the first, the Board, calling attention to its "*policy* of not making rates effective prior to the institution of a proceeding" (p. 100, *infra*), suggested that it might institute a new rate proceeding on June 1, 1942, for the benefit of carriers having no proceeding then pending. The second memorandum of June 3, 1942, stated:

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pay under contracts with the Postmaster General. On September 4, 1945, it filed a petition to have the Board fix a higher rate. Later it amended the petition to ask that rates be fixed as of January 1, 1943. By analogy to the "new route" cases, the Board held that it had power to grant such retrospective relief. "The fact that in this case the carrier received some compensation, while in the new route cases there was no compensation, is not determinative of the real issue. The important point is that in neither case was there a previously fixed rate for the required service in accordance with the standards of Section 406" (p. 5).

> "The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942, to file a petition under Section 406 of the Act requesting such review. *The Board will accept any such petition filed within the next two weeks as being dated June 1, 1942, if the carrier concerned so desires.*"

Perhaps the Board thought that in this fashion it could pay lip service to its "policy" while avoiding prejudice to any carrier which had withheld a petition in the hope that the Board would start a proceeding itself. But if the Board lacked *power* to make a rate retrospectively effective as of a date earlier than the filing of a petition, of course it could not acquire it by allowing a petition to be filed *nunc pro tunc* that earlier date. "An order may not be made *nunc pro tunc* which will supply a jurisdictional defect." *Stock* v. *Mann*, 255 N. Y. 100, 103, 174 N. E. 76, 77. That is true no matter how equitable the airline's claim for relief might be.[128] Thus the Board actually invited airlines to file petitions asking for retrospective relief which it now says it was powerless to grant.

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[128] *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258, 261; *The Bayonne*, 159 U. S. 687, 692-693; *Gagnon* v. *U. S.*, 193 U. S. 451; *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 145; *Old Nick Williams Co.* v. *United States*, 215 U. S. 541, 544; *Boatmen's Bank* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 2 F. (2d) 972, 973 (C. C. A. 8); *Osborn* v. *United States*, 50 F. (2d) 712, 713 (C. C. A. 4); *United States* v. *Rayburn*, 91 F. (2d) 162, 164 (C. C. A. 8); *In re Richmond Hill Electrical Supply Co., Inc.*, 47 F. (2d) 948, 949; *In re Vasquez*, 50 F. (2d) 271.

In *United Air Lines Transport Corp.—Mail Rate Proceeding*, 3 C. A. B. 289, a petition was filed on December 26, 1941, asking revision of the rate from that date. On December 15, 1941, one of the airline's schedules had been discontinued by the Post Office Department. This caused a reduction in its total mail compensation. In January 1942 the airline asked that its petition be amended so as to request an adjustment of the rate as of December 15, 1941. As the Board did not want the airline's total mail compensation reduced, it allowed the amendment "to avoid such an unintended result," and then adjusted the rate on the route upwards as of December 15 (p. 292). To be sure, the airline's total mail compensation was not "substantially" affected but the fact remains that the Board actually increased the rate as of a date before the petition was actually filed, thus exercising power which it now claims did not exist.

C. Retrospective "Reopening" of "Final" Rate Orders

In one of its earliest rate cases, the Board retrospectively increased a rate, long after it had become "final," without paying even lip service to its "general policy."

In June 1939 certain transatlantic mail rates were established, effective May 20, 1939. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220. The order set excess rates for loads over 1,600 pounds, "provided such trip shall have been completed at least as far as Foynes, Ireland or Lisbon, Portugal" (p. 258). It provided that the airline "shall not be entitled to any payment for any trip which shall not continue at least as far as Foynes, Ireland, or Lisbon, Portugal" (pp. 257, 258). On February 23, 1940, the Board "reopened" the proceeding on its own motion "to determine whether the rate of

compensation being paid . . . for the transportation between the United States and . . . the Azores" was fair "and in case such rate should not be found to be fair and reasonable, to fix and determine the fair and reasonable rate" therefor. *Pan American Airways Co. (of Delaware) —Transatlantic Mail Rates*, 1 C. A. A. 650. It found that the existing rate was unfair. "The fact that the volume of mail between the United States and the Azores is nominal in no way alters the fact that petitioner is entitled to a fair and reasonable rate of compensation for the service rendered in transporting such mails" (p. 652). Thereupon it "amended" its original order to authorize excess rates on mail carried only to the Azores, retrospectively to May 20, 1939—8 months earlier than the reopening of the proceeding (p. 654).

Conversely, in *Pan American Airways, Inc., Latin-American Rate Case*, 3 C. A. B. 657, 6 C. A. B. 85, the Board set a final mail rate of 17.83¢ per airplane mile beginning September 1, 1942. Then the Board discovered it had given the airline too much. By an order of February 28, *1944*, the proceeding was "reopened" and the rate "placed under general review" (6 C. A. B., at p. 92).[129]

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[129] The airline had previously filed a petition to reopen the proceeding. It had been granted on November 25, 1942, but only "with respect to certain limited issues," and the proceeding had not been reopened with respect to the rate in question. The order of February 28, 1944 (Serial No. 2726), recited "that review and possible revision of the rate of compensation effective from and after September 1, 1942 . . . is necessary" and that "review and revision of the rate previously fixed in this proceeding . . . . is not within the scope of the issues now pending before the Board pursuant to its order of November 25, 1942, reopening this proceeding," and expressly ordered that the proceeding be "reopened for the purpose of rehearing, reargument and reconsideration with respect to the rate of compensation to be paid Pan American Airways, Inc. for the transportation of mail by aircraft on the Latin American routes from and after September 1, 1942 . . ."

Then by a later order the Board reduced the rate to 13.32¢ per airplane mile, effective September 1, *1942*.[130]

If the Board has no power to revise rates retrospectively in a new proceeding, manifestly it cannot create that power by the transparent device of calling the new proceeding a "reopening" of the old one, for "the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed." *United States* v. *Mayer*, 235 U. S. 55, 70.[131] Hence these decisions necessarily recognized that the Board has power to change a rate retrospectively to a day antedating the proceeding instituted to effect that change.

D. The "System" Cases

1. *Western Air Lines, Inc.—Mail Rate for Routes Nos. 13, 19 and 52*, 4 C. A. B. 441, involved an airline which originally had only two routes, on which "final" rates were in effect before 1941. On *June* 12, 1941 it began mail service over a new route. It received no compensation for carrying mail over that route. In *December* 1941 it petitioned the Board for an order fixing rates for its entire

[130] Below it was sought to sustain this action by reference to §1005(d) of the Act (49 U. S. C. §645(d)), which says: "Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper." Of course, if §1005(d) applied it would equally confer power on the Board in this case retrospectively to "modify" its order fixing TWA's mail pay. But the fact remains that §1005(d) is expressly made subordinate to all other provisions of the Act, including of course §406(a)(1). The Board's power to act retrospectively was necessarily derived from §406(a)(1).

[131] See also, *Delaware, Lackawanna & Western Rd. Co.* v. *Rollstab*, 276 U. S. 1, 4-5; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 549, 552; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320.

system of three routes. Later it moved to withdraw that petition and asked to have a rate fixed only for the new route. The Board denied that motion because it thought the rates "should be considered and determined upon a system basis" and that "the rates of compensation payable to respondent on all of its routes should, in so far as feasible, be subject to review and determination during the period" of operations over the new route (p. 442).

Concluding that "a review of respondent's need for mail compensation subsequent to *June* 12, 1941, is in order" (p. 444), the Board reviewed operations over all three routes from that date. It decided that the "mail compensation already paid respondent" on its two old routes "was adequate to meet all of its need" (p. 444). Because those rates "adequately compensated respondent for the services rendered over its entire system" it felt that "no revision of such rates is necessary," and fixed *no* rate of compensation for the new route for the first year and a half of its operations (p. 445).[132]

Referring to its action in reviewing the fairness of the old rates during the six months before the petition was filed, the Board said (p. 444):

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[132] Similar action was taken where "final" rates were previously in effect for all routes. *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139. Rates were in effect for all of TWA's routes prior to 1941. On *March* 13, 1941, TWA petitioned for a new rate for just one route. On *August* 13, 1941, the Board commenced a proceeding to set new rates for all other routes of TWA, consolidating it with TWA's petition. The Board reviewed the rates on all routes from *March* 13, 1941 as "under the present circumstances the Board deems it necessary to review the operations of petitioner as a whole" (p. 143) but found that no revision was necessary (p. 144).

> "This, it should be emphasized, arises out of the unusual circumstances surrounding this case, where even though no proceeding was pending, a review of respondent's mail compensation was necessitated by the operation of a route for which no rate of mail compensation had been fixed. In the absence of like unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order."

Actually the new route did not "necessitate" the Board's action at all. The Board is able to fix rates on a "system" or over-all basis, rather than for each route, because "the Act does not *require* the maintenance of the route concept."[133] But the Act does not require the "system" basis of rate-making either. The Board has recognized that "we may fix a rate for a single route if such a review indicates the necessity therefor" (*Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143), and has done just that several times.[134] Thus retrospective revision of the previous rates on the old routes

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[133] *Inland Air Lines, Inc.—Mail Rates for Routes Nos. 28 and 35*, 3 C. A. B. 491, 492. See also, *Eastern Air Lines, Inc., Mail Rate Proceedings*, 3 C. A. B. 733, 740; *Pennsylvania-Central Airlines Corp., Mail Rates*, 4 C. A. B. 22, 25.

[134] See, *e.g., Mid-Continent Airlines, Inc.—Mail Rate for Route No. 48*, 2 C. A. B. 392, 393; *Pan American Airways, Inc., Latin-American & Miami Leopoldville Services, Mail Rates*, Order No. E-738, July 24, 1947, p. 12. Indeed, in certain cases the Board regards itself as constitutionally obligated to fix a rate for a "segregated" route rather than the whole system. *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, 68.

TWA's transatlantic routes are new routes for which only a "temporary" rate has been set. *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421. Yet the Board concluded below that "TWA's domestic and international operations are separate units for rate-making purposes" (90), and therefore declined to apply the "system" cases to TWA.

in a system is not at all mandatory merely because a new route is begun.

If the Act confers no power to reduce retrospectively the excessive compensation which an airline has been paid for rendering certain service, because the rates of compensation are "final," the Board cannot accomplish that result indirectly when the airline later begins a new route. Yet that is what it did in the *Western* case. Nominally it left the old rates on the system unchanged, and gave the airline nothing for carrying mail over the new route. Realistically, it reduced the compensation on the system retrospectively back of the date of the petition, since the airline received no more mail pay although it rendered more mail service.[135]

The Board argued below that the circumstances in the *Western* case were quite different from those here, and that neither "the grounding of planes" nor "labor difficulties" are "particularly unusual" (82-83, and footnote 33). Of course there is nothing at all unusual about opening a new route. But the argument completely misses the point. Section 406(a)(1) does not give the Board special power where a carrier adds a new route to its system, or where "unusual" circumstances arise. Its language is

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[135] Completely untenable is the suggestion made below that the "system" cases can be supported on the ground that, in fixing the *quantum* of compensation to be paid for carrying mail over a new route, the Board "must take into consideration" the airline's revenue from other sources. The airline must always be paid some compensation for the additional service on that route. *Pan American Airways Co. (of Delaware)—Transatlantic Mail Rates*, 1 C. A. A. 650, 652. The "rate of compensation" can never be less than the reasonable value of that service, based on *quantum meruit* principles. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 252. Yet in the *Western* case nothing at all was paid for operating over the new route for over eighteen months.

completely general. Certainly it creates no hierarchy of "unusual" circumstances, drawing fine-spun distinctions between one "unusual" situation and another. If the Board lacks power to make a "retroactive revision of a final rate" on old routes, it cannot usurp that power just because a new route has been inaugurated and it usually likes to set a rate for an entire system.

2. In the *Western* case the old rate was nominally left undisturbed. More recently the Board modified an old rate in terms as well as in fact. A carrier operated two old routes at a rate of 21.61 cents per airplane mile. *Colonial Airlines, Inc., Mail Rate*, 7 C. A. B. 415. On April 15, 1946, it started two new routes. In *December* 1946 it filed a rate petition. The Board fixed a lower temporary rate (20 cents per airplane mile) on *all four* routes, retrospectively to *April* 15, 1946. *Colonial Airlines, Inc.*, 7 C. A. B. 986.[136]

3. Recently the Board struggled to reconcile the decision herein with its holdings in the "system" cases. An airline at first operated only one route, on which a "final" rate was in effect. *Northeast Airlines, Inc., Mail Rate—Route No. 27*, 4 C. A. B. 181, 194. On May 1, 1945, it began a second route. On May 14, 1945, it petitioned for a rate on that new route alone. On *June* 20, 1945, the Board began a proceeding to fix a rate for the "system," and consolidated the proceedings. It reviewed the facts back

[136] Later the Board proposed an increase to 50 cents per airplane mile temporarily, stating that "the permanent rate . . . fixed shall be retroactively effective to *April 15, 1946*." Order No. E-1263 (Mar. 4, 1948), p. 5. Evidently the Board realized belatedly that it was doing precisely what it had held, in this case, it could not do, for shortly thereafter, when it put the increase into effect, it said that the "final rate" would be "retroactive to such date as the Board shall then determine." Order No. E-1340 (Apr. 1, 1948), p. 4.

to May 1, 1945, and fixed the compensation for the system "for the period beginning *May* 1, 1945," at a lump sum, "equal to 29.36 cents per airplane mile flown." *Northeast Airlines, Inc., Mail Rates*, Order No. E-1230 (Feb. 26, 1948), order p. 2. Since that rate did "not provide an *upward* adjustment of mail rates on the old Route No. 27 for the period prior to June 20, 1945, when proceedings were initiated with respect to that route" the case was thought by the Board to present "no problem of retroactivity within the principle of the TWA" case (opinion, pp. 35-36).

The Board's argument in the "system" cases carries hair-splitting to the nth degree. First the Board reads into §406(a)(1) a limitation forbidding rates to be retrospectively revised earlier than the time when the rate proceeding begins. Until that time, rates are conclusively presumed to be frozen at a fair amount. Next it engrafts on the limitation an exception which enables it to unfreeze those rates to effect such a retrospective revision when it wants to fix rates on a "system" basis. Then it reads into that exception another one which permits the revision to be made downward, but not upward. Such mental gymnastics indicate that something is radically wrong with the Board's basic interpretation of the Act.

E. Significance of the Board's Action

The Court below, in referring to this long line of Board decisions making rates effective as of dates prior to the initiation of rate proceedings, said "we do not find those instances indicative of the retroactivity which is necessary to support [TWA's] position here" (115). But the fact remains that the Board has repeatedly made such retrospective rate changes and that the sole source of its authority has been its power "to make such rates effective from

such date as it shall determine to be proper." If that language is sufficient to support the actions set forth above, it certainly authorizes the type of adjustment sought herein.

Until its decision below the Board cautiously but repeatedly exercised the power now disclaimed. This administrative interpretation is added proof that there is nothing "ambiguous" about §406(a)(1). But if the Act mysteriously became ambiguous after ten years, the Board's original and long-standing interpretation would be decisive.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369. Where a statute is ambiguous, however, its interpretation by administrative agencies goes "far to remove doubt as to its meaning if any existed," *First National Bank* v. *Missouri*, 263 U. S. 640, 658, and is always "entitled to great weight." *Boutell* v. *Walling*, 327 U. S. 463, 471.[137] "The practice has peculiar weight when"—as here—"it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.[138]

We submit that §406(a)(1) is perfectly plain, but if its clear words can be tortured into "ambiguity," the Board's previous interpretation has pointed the proper way to resolve any doubt on that score.

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[137] For applications of this principle in mail pay cases, see *United States* v. *Alabama Great Southern Rd. Co.*, 142 U. S. 615, 621; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, 121; *Ewckenbach Steamship Co.* v. *United States*, 280 U. S. 173, 182.

[138] See also *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 549; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

SUPPLEMENT TO APPENDIX A

Civil Aeronautics Board's Memoranda of May 22 and June 3, 1942

May 22, 1942

Memorandum to the President of Each Domestic Air Carrier:

The Board has been considering what action should be taken by it with respect to the mail rates of air carriers (both those carriers which now have mail rate cases pending and those which do not) in the light of the new service pattern necessary under the recent transfer of planes to the Military. Attached is a statement of general principles designed to provide a basis for action in these circumstances.

The Board feels that the course of mail rate cases will be clarified and expedited if the Board could have in advance such criticism, modification or amplification of these suggestions as the carriers deem warranted or desirable.

Will you, therefore, please transmit twelve copies of any comment of your company to the Board by May 29, 1942. The question of oral presentation of views is reserved for consideration in the light of subsequent developments.

A copy of this memorandum is being sent to all counsel for the carriers.

L. WELCH POGUE
L. Welch Pogue
Chairman

Attachment

Statement of General Principles to Govern Mail Rate Cases in the Light of the New Service Pattern

1. Having in mind the restrictions and changes in operation which will result from the delivery of planes to the Military and the operation of still further planes for the Military under contract, it will be necessary to review the mail rates of all air carriers affected thereby for the purpose of revising them in the light of the change in operations. This necessity for review applies to all air carriers affected by the change whether their rates are presently the subject of a rate proceeding or not.

2. It is desirable that, in so far as possible, for procedural purposes in connection with mail rate cases, the date of the changeover to the new service pattern be regarded as having occurred on the same date for all carriers and that such uniform date be the last day of a month. For this purpose May 31, 1942 is suggested.

3. Because of the uncertainties inherent in the present situation and the period of time which will undoubtedly be required to adjust to the new service pattern, it is not feasible to fix fair and reasonable rates for the future on the information presently available or which will be available until the process of adjustment has been substantially completed. Therefore, all rates effective on and after the date of the changeover to the new service pattern should be temporary in character, and should be subject to review and adjustment as to such period as experience may show the necessity for adjustment after a reasonable period of time. At the same time it is considered desirable in the case of all

carriers who now have rate proceedings pending to fix as rapidly as possible a final rate to be effective for all periods under review up to the date of the changeover to the new service pattern.

4. For the purposes of accomplishing the above objectives, it is proposed in all pending rate cases of carriers affected by the new service pattern, including those in which show cause orders have already been issued, to fix a rate which will be final for all past periods under review down to May 31, 1942, and temporary for the period thereafter. With respect to all carriers who do not now have a rate proceeding pending, it is proposed, in view of the Board's policy of not making rates effective prior to the institution of a proceeding, to issue an order instituting a proceeding to fix and determine the fair and reasonable rates for each such carrier from and after the date of the changeover to the new service pattern. It is the intention that this order will bring into issue the rate presently being paid such carrier and make such rate for the period subsequent to June 1, 1942 subject to review and adjustment after sufficient experience has been accumulated.

5. After sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become somewhat stabilized, it is proposed to issue in all proceedings a show cause order setting forth a tentative final rate, upon the general principles hereinafter set out, for the period beginning on the date of the changeover to the new service pattern. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed for the period then under review.

6. It is contemplated, however, that in any case where the carrier can show financial distress due to the fact that its total revenues, including both non-mail of all kind and mail, furnish it with insufficient income to support its operations, the carrier may apply for adjustment of its temporary rate to afford it relief from such distress prior to the fixing of a final rate for the period.

7. The carriers' expenses should be brought to a level consistent with the scope of the operations which can be expected to result from the combined commercial and military operations. This principle must be qualified, however, by recognizing that: (a) It can not be expected that the carriers will be able to reduce expenses in the full proportion in which their level of operations is reduced; (b) they should maintain such organizations as will enable them to be prepared to deal promptly and efficiently with any new obligations which may be imposed upon them by military requirements; and (c) the carriers will not be able to effect immediate reductions in expenses to the extent which may ultimately be appropriate.

8. Where all operations at a point have been discontinued, the expenses formerly incurred at such point should not be considered in the mail rate unless it appears that the carrier is bound by a non-cancelable contract for such expenses and receives no other reimbursement of such expenses, or unless it appears that certain expenses are necessary for protection or maintenance of facilities at such point. Notice of cancelation of some contracts and "adjustment payments" for cancelation may be necessary.

9. The profit element of mail rates should be fixed without substantial reference to stimulus for development of

commercial revenues and traffic, and should not undertake to compensate the carriers for any lack of profit under the contracts with the Military, but should be fixed to provide an incentive for keeping expenses during the war to a minimum compatible with safe and efficient service.

10. Consideration will be given to the possibility of establishing standards for total operating expenses, or for certain categories of expense, as a criterion of economy of operation.

11. The Board will require such information concerning the carrier's revenues and expenses incident to its operations for the Military as may be necessary to enable the Board to give appropriate consideration to such revenues and expenses in fixing mail rates in these cases.

* * *

Memorandum to the President of Each Domestic Air Carrier:

On May 22, 1942 the Board submitted to you a statement of general principles designed to provide a basis for action in mail rate cases in the light of the new service pattern necessary under the recent transfer of planes to the Military. An opportunity was given the carriers to present written comments to the Board thereon, and comments have now been received from a number of carriers.

In view of the substantial differences of opinion among the carriers expressed in their comments, the Board has decided to withdraw the suggestions contained in its earlier memorandum. In lieu thereof, the Board will follow the procedure outlined hereinafter.

The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942 to file a petition under section 406 of the Act requesting such review. The Board will accept any such petition filed witnin the next two weeks as being dated June 1, 1942 if the carrier concerned so desires. In the event such a petition is filed, the Board, after sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become some what stabilized, will issue in such proceeding a show-cause order setting forth a proposed rate. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed both for the past and future periods.

In all pending rate cases of carriers affected by the new service pattern, including those in which show-cause orders have already been issued, the Board will proceed in accordance with its usual procedure to fix a final rate both for the period prior and subsequent to June 1, 1942. Such final rate will be based primarily upon evidence concerning the past operations of the carrier. It is recognized that the forecasting of the future under existing circumstances is extremely difficult, if not impossible. It is, therefore, assumed that any evidence submitted concerning the future period will deal, so far as possible, with general principles and probable trends except where specific commitments have already been made or specific facts are already determined. The rates fixed in the pending proceedings will be final so far as these proceedings are concerned, and, if

the carrier concerned desires any adjustment in this rate in the future, it will be necessary for it to file a petition in the normal way.

The Board recognizes that in special instances unusually expeditious treatment of rate proceedings will be necessary, and it will do its utmost to provide such treatment in those cases.

A copy of this memorandum is being sent to all counsel for the carriers.

Civil Aeronautics Board

June 3, 1942

APPENDIX B

Relevant Statutory Provisions

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 973, 49 U. S. C. §§ 401-691

Declaration of Policy

None

None

DECLARATION OF POLICY

Sec. 2 (52 Stat. 980, 49 U. S. C. §402) In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 973, 49 U. S. C. §§ 401-691

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Carrier's Statutory Duty to Carry Mail

Sec. 5, subd. 27 (39 Stat. 429, 39 U. S. C. 534) [illegible] transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

Sec. 5, subd. 33 (39 Stat. 431, 39 U. S. C. 563) It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation pro-

Requirement as to Carriage of Mail

Sec. 401(*m*) (52 Stat. 990, 49 U. S. C. 481(*m*)) Whenever so [illegible] carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Application for Abandonment

Sec. 401(*k*) (52 Stat. 990, 49 U. S. C. 481(*k*)) No air carrier shall abandon any route, or part-

Carrier's Statutory Duty to Carry Mail

Sec. 5, subd. 27 (39 Stat. 429, 39 U. S. C. §511) All railway common carriers shall transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

Sec. 5, subd. 33 (39 Stat. 431, 39 U. S. C. §563) It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General to do so, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.

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safety; and

(f) The encouragement and development of civil aeronautics.

REQUIREMENT AS TO CARRIAGE OF MAIL

Sec. 401(m) (52 Stat. 990, 49 U. S. C. §481(m)) Whenever so carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

APPLICATION FOR ABANDONMENT

Sec. 401(k) (52 Stat. 990, 49 U. S. C. §481(k)) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

TENDER OF MAIL

Sec. 405(g) (52 Stat. 995, 49 U. S. C. §485(g)) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder

thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

SAFETY AND POSTAL OFFENSES

Sec. 901(a) (52 Stat. 1015, 49 U. S. C. 621 (a)) Any person who violates (1) any provision of titles V, VI, and VII of this Act, or any provision of subsection (a) (1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to

CRIMINAL PENALTIES—GENERAL

Sec. 902(a) (52 Stat. 1015, 49 U. S. C. §622(a)) Any person who knowingly and willfully violates any provision of this Act (except titles V, VI, and VII), or any order, rule, or regulation issued under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

Authorization to Award Mail Contracts

Sec. 5, subd. 10 (39 Stat. 427, 39 U. S. C. §565). The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special

Sec. 3(a) (48 Stat. 933) The Postmaster General is authorized to award contracts for the transportation of air mail by airplane between such points as he may designate, and for initial periods of not exceeding one year,* to the lowest

[No authorization to award new contracts except "in the event of emergency caused by flood, fire or other calamitous visitation." Sec. 405(k) (52 Stat. 997, 49 U. S. C. §485(k)).]

* Words "one year" changed to "three years" by amendment of August 14, 1935 (49 Stat. 616).

contracts are made and the terms and reasons therefor.

responsible bidders tendering sufficient guaranty for faithful performance in accordance with the terms of the advertisement at fixed rates per airplane-mile: *Provided,* That where the Postmaster General holds that a low bidder is not responsible or qualified under this Act, such bidder shall have the right to appeal to the Comptroller General who shall speedily determine the issue, and his decision shall be final: *Provided further,* That the base rate of pay which may be bid and accepted in awarding such contracts shall in no case exceed 33-1/3 cents per airplane-mile for transporting a mail load not exceeding three hundred pounds. Payment for transportation shall be at the base rate fixed in the contract for the first three hundred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane mile.

Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act

dred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane-mile.

Sec. 3(c) (48 Stat. 934) Authorizes Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act nor that provided for in the original contract: *Provided*: that no such contract may be so extended unless the contractor shall agree in writing to comply with all the provisions of this Act during the extended period of the contract.

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Termination of Mail Contracts

None

Sec. 6(c) (48 Stat. 935) Any contract which may hereafter be let or extended pursuant to the provisions of this Act, and which has been satisfactorily performed by the contractor during its initial or extended period, shall thereafter be continued in effect for an indefinite period, subject to any reduction in the rate of payment therefor, and such additional conditions and terms, as the [Interstate Com-

None [Contracts entered into under the Air Mail Act canceled upon the issuance of a certificate of convenience and necessity authorizing mail transportation. Sec. 405 (52 Stat. 994, 49 U. S. C. §485(a)).]

merce] Commission may prescribe, which shall be consistent with the requirements of this Act; but any contract so continued in effect may be terminated by the said Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated by the contractor at its option upon sixty days' notice. On the termination of any air-mail contract, in accordance with any of the provisions of this Act, the Postmaster General may let a new contract for air-mail service over the route affected, as authorized in this Act.

First sentence of above provision superseded by Sec. 6 (c) of amendment of August 14, 1935, set forth under "Express Power to Make Retroactive Adjustments in Specific Situations" (p. B10, *infra*).

Power to Fix Rates From an Effective Date

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and de-

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and

AUTHORITY TO FIX RATES

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a)) The Authority is empowered and directed, upon its

and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by

ticable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by airplane and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods

own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other

as authorized in this Act..

First sentence of above provision superseded by Sec. 6 (c) of amendment of August 14, 1935, set forth under "Express Power to Make Retroactive Adjustments in Specific Situations" (p. B10, *infra*).

Power to Fix Rates From an Effective Date

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

Sec. 5, subd. 30(g) (39 Stat. 430, 39 U. S. C. §551) At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation.

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by airplane and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, [and so much of subsection (g) of section 3 of this Act as is in conflict with this section is repealed.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

† Bracketed words deleted by amendment of August 14, 1935 (49 Stat. 616).

Authority to Fix Rates

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Sec. 3 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-seven hundred and twenty, of December eighteenth, nineteen hundred and thirteen, respecting rates upon and limit of weight of parcel-post packages, effective from January first, nineteen hundred and fourteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after January first, nineteen hundred and fourteen, for the remainder of the contract terms, not exceeding one per centum thereof per annum.

Sec. 4 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425) That the Postmaster General is author-

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Express Power to Make Retroactive Adjustments in Specific Situations

Sec. 6(c) (49 Stat. 617) Any contract (1) let, extended, or assigned pursuant to the provisions of this Act, and in full force and effect on March 1, 1935, or (2) which may be let subsequent to such date pursuant to the provisions of this Act and shall have been satisfactorily performed by the contractor during its full initial period, shall, from and after such date, or from and after the termination of its initial period, as the case may be, be continued in effect for an indefinite period, and compensation therefor, on and after March 1, 1935, during such period of indefinite continuance, shall be paid at the rate fixed by order of the Commission under this Act, subject to such additional conditions and terms as the Commission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for cause by the contractor upon sixty days' notice.

Above provision added in its entirety by amendment of August 14, 1935, super-

Civil Aeronautics Act of 1938
52 Stat. 973, 49 U. S. C. §§ 401-691

See Section 406(a)(1) (*supra*, pp. B8-B9).

Sec. 4 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425) That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

Sec. 5, Subd. 39 (39 Stat. 429) Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and by order of the Commission under this Act, subject to such additional conditions and terms as the Commission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for cause by the contractor upon sixty days' notice.

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* Above provision added in its entirety by amendment of August 14, 1935, superseding first sentence of Sec. 6(c) set forth under "Fermination of Mail Contracts" (pp. B7-B8, *supra*).

approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided,* That if the final decision of the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

Factors to be Considered in Setting Rates

Sec. 5, subd. 29 (39 Stat. 429, 39 U. S. C. §543). In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

Sec. 5, subd. 30(i) (39 Stat. 430, 39 U. S. C. §554). For the purposes of [the Railway Mail Pay Act] the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

Sec. 6(e) (48 Stat. 936) In fixing and determining the fair and reasonable rates of compensation for air-mail transportation, the Commission shall give consideration to the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources, and from a consideration of these and other material elements, shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom. [In arriving at such determination the Commission shall disregard losses resulting, in the opinion of the Commission, from the unprofitable maintenance of non-mail schedules, in cases where the Commission may find that the gross receipts from such schedules fail to meet the additional operating expense occasioned thereby. In fixing and determining such rates, if it shall be contended or alleged by the holder of an air-mail contract that the rate of compensation in force for the service involved is insufficient, the burden of establishing such insufficiency and the extent thereof shall be assumed by him. In no case shall the rates fixed and determined by the said Commission hereunder exceed the limits prescribed in section 3(a) of this Act.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

Rate-Making Elements

Sec. 406(b) (52 Stat. 998, 49 U. S. C. §486(b)). In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Pending Administrative Proceedings

Sec. 1108(b) (52 Stat. 1029, 49 U. S. C. §678(b)) The provisions

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 973, 49 U. S. C. §§ 401-691
		of this Act shall not affect any proceedings pending before the Secretary of Commerce or the Postmaster General, or proceedings pending before the Interstate Commerce Commission for the determination of rates for the transportation of air mail by aircraft, on the date of the enactment of this Act; but any such proceedings shall be continued, orders therein issued, appeals therefrom taken, and payments made by the Postmaster General pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceeding shall continue in effect until modified, terminated, superseded, or repealed by the Authority or by operation of law: *Provided*, That the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".
	Duty to Re-examine Effective Rates	
Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. §553) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates cov-	Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the	No specific provision.

or repealed by the Authority or by operation of law: *Provided,* That the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".

Duty to Re-examine Effective Rates

Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. §553) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application, provided said carrier or carriers have an interest therein.

Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the transportation of air mail by airplane under this Act so far as consistent with the provisions of this Act.

Sec. 6(b) (48 Stat. 935) The Interstate Commerce Commission is hereby directed at least once in each calendar year from the date of [letting]† [the award]* of any contract [to examine the books, accounts, contracts and entire business records of the holder of each air-mail contract, and]† to review the rates of compensation being paid to [the]† [such]* holder [of such contract]† in order to be assured that no unreasonable profit is [resulting]† [being derived]* or accruing therefrom [and in order to fix just rates].* In determining what may constitute an unreasonable profit the said Commission shall take into consideration [all forms of]† [the]* income derived

No specific provision.

from the operation of airplanes over the routes affected [and in addition to the requirements of sections 3(f) of this Act, shall take into consideration all forms of expenditures of said companies in order to ascertain whether or not the expenditures have been upon a fair and reasonable basis on the part of said company and whether or not the said company has paid more than a fair and reasonable market value for the purchase or rent of planes, engines, or any other types or kind, or class, or goods, or services, including spare parts of all kinds, and whether or not the air-mail contracting company has purchased or rented any kind of goods, commodities, or services from any individuals who own stock in or are connected with the said contracting companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives].*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 617).
† Bracketed words deleted by amend-

companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives].*

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* Bracketed words added by amendment of August 14, 1935 (49 Stat. 617).

† Bracketed words deleted by amendment of August 14, 1935 (49 Stat. 617).

Requirement That Carrier Estimate Fair Rate

None

None

Statement of Postmaster General and Carrier

Sec. 406(c) (52 Stat. 998, 49 U. S. C. §486(c)). Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the Authority to be material to the inquiry.

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 973, 49 U. S. C. §§ 401-691
	Judicial Review of Rate Orders	
None [See *United States* v. *Griffin*, 303 U. S. 226.]	None	ORDERS OF AUTHORITY SUBJECT TO REVIEW Sec. 1006(a) (52 Stat. 1024, 49 U. S. C. §646) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. VENUE (b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia. NOTICE OF AUTHORITY; FILING OF TRANSCRIPT (c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

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in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

[illegible] OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

POWER OF COURT

(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

FINDINGS OF FACT BY AUTHORITY CONCLUSIVE

(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the

court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

NOTE: The Authority is now known as the Board.

Other Relevant Provisions of the Civil Aeronautics Act

Notice of Tariff Change

Sec. 403(c) (52 Stat. 993, 49 U. S. C. §483(c)): No change shall be made in any rate, fare, or charge, or any classification, rule, regulation or practice affecting such rate, fare or charge or the value of the service thereunder specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Authority may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Power to Prescribe Rates and Practices of Air Carriers

Sec. 1002(d) (52 Stat. 1018, 49 U. S. C. §642(d)): Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Authority shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Authority shall determine and prescribe the lawful rate, fare, or charge (or

the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Authority shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

RULE OF RATE MAKING

Sec. 1002(e) (52 Stat. 1018, 49 U. S. C. §642(e)). In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Authority shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Power to Prescribe Divisions of Rates

Sec. 1002(h) (52 Stat. 1018, 49 U. S. C. §642(h)). Whenever, after notice and hearing, upon complaint or upon its own initiative, the Authority is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, the Authority shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Authority may require the adjustment of divisions between such air carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Authority finds to be just, reasonable, and equitable.

SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

GERALD B. BROPHY,
Attorney for Petitioner.

CHARLES PICKETT,
JOSEPH S. ISEMAN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

This case has been inflated to undue proportions. It comes down to one concrete, practical issue. If TWA's mail rate was unreasonably low, does the Board lack *power* to say so, fix a fair rate and make it effective from the date that the rate actually became too low?

The Act "empowered" the Board, after notice and hearing, "to make such rates effective from such date as it shall determine to be proper." All the Board's "public utility" slogans, rarefied policy arguments and dialectical subtleties cannot obscure that simple fact. Like the Court below, it wanders away from what the Act says into the realm of policy, with the net result that the "make effective"

clause ends by being twisted into something that Congress could have said but just did not say.

Congress could have used in §406 the same language which is in the Act's public utility rate provisions, but it did not. It could have given the Board a limited power to make mail pay rates effective only for the future, or only from the filing date of the proceeding, but it did not. Congress did something entirely different. Revision of the Act is the province of Congress. The Board is asking the Court to rewrite the statute in the guise of interpreting it. If the Board does not like the "make effective" clause, it should ask Congress to change it. If it does not feel that it can be trusted to exercise the broad power which Congress gave it, it should ask Congress to revise the Act so as to tie its hands. The language of the Act is perfectly plain, and while it stands it must be taken as it reads.

Time does not permit a reply to all the Board's arguments. Many of them were considered fully in our main brief. Certain other points will be noted here.

I. The Unambiguous Language of Section 406.

The Board's basic argument is that, if the power conferred by §406(a)(1) "to make such rates effective from such date as it shall determine to be proper" is construed to mean just what it says, the "Act's directions to 'fix' 'rates', to take into consideration the service 'to be rendered', and the need for compensation 'to insure the performance' of such service, all become meaningless" (Res. Br., pp. 11-12).[1] "Many of the words and phrases used in

[1] We shall refer to the Board's brief as "Res. Br." and our main brief as "Pet. Br.," and continue to use the abbreviations in Pet. Br., p. 1, note 1. Unless otherwise stated, all italics are ours.

Section 406 point to the necessity for interpreting the Act as the Board and the Court of Appeals did" (Res. Br., p. 47).

As this Court recently said of another statute: "The language selected by Congress . . . . is simple and direct. Consideration of its meaning by the introduction of dialectical subleties can serve no useful interpretative purpose."[2] None of the "words and phrases" in §406 necessitates, or justifies, reading limitations into the "make effective" clause which Congress did not put there.

A. The Word "Rates."

First the Board suggests that the word "rates" shows that Congress was referring to a "measure of payment for future operations" (Res. Br., p. 48). "Rates" varies widely in meaning[3], like most words.[4] In the field of mail pay, it has no connotation at all of a "measure of payment for future operations." Nor is there anything "meaningless" about fixing a "rate of compensation" for carrying the mails in the past. For generations mail pay "rates" have been fixed and revised for past periods (see Pet. Br., pp. 13-16, 32).

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[2] *Coray* v. *Southern Pacific Co.*, 93 L. Ed. adv. op. 243, 245 (Jan. 3, 1949).

[3] "The word 'rate' in our statute, like most other words, has different meanings dependent upon the context and the result intended to be accomplished." *Central Nat. Bank* v. *City of Lynn*, 259 Mass. 1, 12, 156 N. E. 42, 47.

[4] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425. See also, *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 545; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124.

1. In former days the Postmaster General regularly fixed mail pay "rates" for past periods. Typical is the following "circular notice of adjustment of pay" sent in *December*, 1877, fixing a revised mail rate from *July*, 1877, as well as for the future:

> "The compensation for the transportation of mails, etc., on your road, route between and , has been fixed from July 1, 1877, to June 30, 1881 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, upon returns showing the amount and character of the service for thirty days, commencing April 16, 1877, at the *rate* of per annum, being $ per mile for miles."[5]

Similar orders, fixing mail pay "rates" for past as well as for future services, were repeatedly made by the Postmaster General.[6] Neither he nor the courts thought that

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[5] *Eastern Rd. Co. v. United States*, 129 U. S. 391, 393. This was a 10% reduction from the prior rate. Later, on July *12*, 1878, the Postmaster General decreased the pay again "from July *1*, 1878, to June 30, 1881, $558.19 per annum, leaving the pay from the first-named date $13,233.55 per annum, being a reduction of five per centum from the *rates* fixed for weight of mails in accordance with" a statute passed in June 1878. See 129 U. S., at p. 394.

[6] For instance, in *Chicago, Milwaukee & St. Paul Ry. Co. v. United States*, 198 U. S. 385, the first order, made *December* 1, 1890, provided that "compensation for the transportation of mails" for an entire route "has been fixed from *Sept.* 23, 1890, to June 30, 1891 . . . at the *rate* of $35,022.37 per annum, being $132.53 per mile for 264.26 miles" (p. 387). The second order, made *December* 3, 1890, provided that "compensation for the transportation of mails" on only the extended portion of the route "has been fixed from *February* 24, 1890, to June 30, 1891 . . . at the *rate* of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension" (p. 388).

there was anything meaningless about fixing a "rate" of mail pay for past periods.

2. Nor did the Interstate Commerce Commission suppose that it was meaningless to fix "rates" of railway mail pay for past operations. Its very first decision under the Railway Mail Pay Act, handed down in December, *1919*, prescribed in detail "the fair and reasonable *rates* of payment for transportation of mail matter *as of* November 1, *1916*, and to January 1, *1918*."[7] Likewise its order sustained in *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, made on December 8, *1925*, "established" certain "*rates* of pay" as "the fair and reasonable *rates* for the period from February 25, *1921*, to December 13, *1923*, with respect to the said carriers."[8]

For other cases setting forth similar orders verbatim see, *e.g.*, *Jacksonville, Pensacola & Mobile Rd. Co.* v. *United States*, 21 C. Cl. 155, 159-162, affd. in 118 U. S. 626; *Minneapolis & St. Louis Ry. Co.* v. *United States*, 24 C. Cl. 350, 351-354; *Alabama, Great Southern Rd.* v. *United States*, 25 C. Cl. 30, 32-33, affd. in 142 U. S. 615; *Wisconsin Central Rd. Co.* v. *United States*, 27 C. Cl. 440, 448-450, affd. in 164 U. S. 190; *Texas & Pacific Ry. Co.* v. *United States*, 28 C. Cl. 379, 381-383; *Evansville & Indianapolis Rd. Co.* v. *United States*, 32 C. Cl. 555, 556-558; *Louisville & Nashville Rd. Co.* v. *United States*, 46 C. Cl. 267, 268.

[7] *Railway-Mail Pay*, 56 I. C. C. 1, 77. "The fair and reasonable *rates* on and after January 1, 1918, are 25 per cent additional to the rates prescribed as of November 1, 1916." *Ibid.*, at p. 78. "Manifestly this was "the fixing of a rate for the past," since "the order was made nearly two years after the effective date." *New York Central Rd. Co.* v. *United States*, 65 C. Cl. 115, 127, affd. in *United States* v. *New York Central Rd. Co.*, 279 U. S. 73.

[8] The order is not set forth in the reported opinions, but appears at p. 13 of the Transcript of the Record.

3. Congress saw nothing meaningless in providing for retroactive adjustment of air mail pay in terms of "rates."[9] Nor did the Commission evidence any embarrassment in fixing "rates" for past periods, as well as prospectively, under the Air Mail Acts (Pet. Br., pp. 56-59). Even Commissioner Mahaffie, who found reasons for dissenting from every retrospective rate change, failed to discern anything contradictory about fixing a "rate" for services already rendered.[10]

4. The Board itself has not found it meaningless to fix "rates" for past services. Repeatedly it has referred to "rate proceedings involving the fixing of mail rates for past periods"[11] without the faintest intimation that there is something peculiar about fixing a "rate" for the past.[12]

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[9] The Air Mail Act of 1935, 49 Stat. 617, passed in *August*, 1935, provided that "compensation therefor, on and after *March* 1, 1935, during such period of indefinite continuance, shall be paid at the *rate* fixed by order of the Commission." See Pet. Br., pp. 55-56, B10.

[10] His dissenting opinions may be searched in vain for any intimation that the word "rate" supported his position. *Air Mail Compensation*, 216 I. C. C. 166, 191; *Air Mail Rates for Route No. 33*, 216 I. C. C. 381, 403; *Air Mail Compensation*, 222 I. C. C. 602, 610.

[11] *Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 291, note 22.

[12] "In making this retroactive determination . . . such nonpay mail schedules should be taken into account in the fixing of a rate of compensation on the mileage flown on the pay mail schedules during this past period." *Northwest Air Lines, Inc.—Mail Rates*, 1 C. A. A. 275, 283. ". . . we find that the fair and reasonable rate of compensation from March 1, 1941, to June 12, 1941, was 51 cents per mail pay mile flown." *Chicago & Southern Air Lines,*

What is more, repeatedly it has fixed mail pay for past periods in terms of "rates."[13] Many of its "decisions have in fact involved an upward adjustment of rates over a past period."[14]

5. The argument is continuously made that "rates of compensation" is used in contrast to "amounts of compensation." This quibble ignores the fact that in the final analysis the airline is entitled to "reasonable compensation," which is an amount reached by multiplying the "rate" by the number of units of mail carried (Pet. Br., pp. 28-29). Rates of compensation are expressed in amounts of money—45¢ per airplane mile, .03¢ per pound mile, and so on—and every rate is fixed to provide the airline with a certain amount of money. The amount of reasonable compensation for past services can therefore be

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Inc.—Mail Rates for Route Nos. 8 and 53, 3 C. A. B. 161, 195. "We will therefore adhere to our previously announced policy against fixing a rate which will result in recovery from the carrier of substantial sums previously received as mail compensation." *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 776. See also the decisions cited in Pet. Br., p. 43, note 48.

[13] Some of the decisions are referred to in Pet. Br., pp. 29 (note 27), 42 (note 45), 43, 85-96. Typical is the order in *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, made on *October* 26, 1945: ". . . on and after *January* 1, 1945, the fair and reasonable *rate* of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith . . . is hereby *fixed*, determined, and published to be 45 cents per ton mile, or fraction thereof, of mail carried, computed monthly on direct airport-to-airport mileage . . ." (p. 603).

[14] *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 326.

expressed in terms of a "rate."[15] In fact, the Board often expresses the "rate" for the past not as a per unit figure but simply as a "total amount."[16]

In short, the word "rates" does not mean a "measure of payment for future operations." Nor does it become "meaningless" if the "make effective" clause is construed as it reads. "Rates" means just what it has always meant in the field of mail pay—a means of computing compensation for services, past or future.

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[15] For example, in *Pan American Airways, Inc., Alaska Mail Rates*, 8 C. A. B. 244, the order made on July 9, 1947, provided that "the fair and reasonable *rate* of compensation . . . is hereby *fixed*, determined, and published for the period August 1, 1944, through December 31, 1945, to be *a total amount* of $2,572,000" (p. 260). The Board added, in a footnote, "This amount is equivalent to 90.36 cents per revenue plane mile flown in Alaska operations, excluding charter services and services over the Fairbanks-Bethel nonmail route." For similar orders, see, *e.g., Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 292; *Chicago & Southern Air Lines, Inc.*, Order No. E-1825, p. 2 (July 28, 1948).

[16] In *Pioneer Air Lines, Inc., Mail Rates*, 8 C. A. B. 175, operations began on August 1, 1945. The petition was filed on August 21, 1945. The order, made on July 2, 1947, provided in part (p. 197):

> "That the fair and reasonable *rates* of compensation to be paid the petitioner for the transportation of mail by aircraft, the facilities used and useful therefor and the services connected therewith . . . are hereby *fixed*, determined and published to be as follows:
>
> "1. For the period August 1, 1945, through August 31, 1946, *a total amount* of $505,420."

The order did not include a footnote explaining that the "total amount" was "equivalent to" or "equal to" a stated number of cents per mile. For other like orders, see, *e.g., Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, 78; *Pan American Airways, Inc., Transpacific Mail Rates*, 6 C. A. B. 83, 84; *Caribbean-Atlantic Airlines, Inc., Mail Rates*, 7 C. A. B. 943, 956.

B. The Word "Fix."

Next the Board concentrates on the word "fix." "The well understood meaning of 'fix' is 'to settle', 'make permanent', 'make certain.' . . . It is impossible to consider a rate as fixed if at any time thereafter it can be revised. It is clear, therefore, that 'fix' cannot be given its normal meaning if the 'make effective' clause is given the meaning which TWA asserts is plain" (Res. Br., p. 49).

Like "rate," the word "fix" has no unvarying "normal" meaning. It "is sometimes used in a broad sense and sometimes in a narrow sense" and "there is no charm about the word itself dominating the situation so that it may not be construed to make the statute comport with reason."[17] Of course in this statute "fix" does not connote permanence or immutability.[18] For §406(a)(1) expressly states that the Board is empowered "to fix and determine *from*

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[17] *Gist* v. *Rackliffe-Gibson Const. Co.*, 224 Mo. 369, 387, 123 S. W. 921, 926-927. Earlier the Court said: "'Fix,' as defined by lexicographers, is used sometimes to accentuate the idea of firmness, stability, immobility, permanence, without variation—but in laws, documents and conversation it is not always used in that strong way. It may mean (depending somewhat upon the context and sense of the thing) prescribe, allow, designate, arrange, determine, decide." 224 Mo., at p. 385, 123 S. W., at p. 926.

[18] Even in a public utility rate statute, "fix" has no such connotation. In *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, an ordinance authorized the city council to contract for the maintenance of waterworks "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." This Court refused to hold that ring words should "be construed to mean by ordinance once for all to endure during the whole period of thirty years," since that construction "would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time" (p. 600).

time to time[19] . . . the fair and reasonable rates of compensation for the transportation of mail by aircraft." Plainly the Act itself considers "a rate as fixed" although "at any time thereafter it can be revised." The authorities already mentioned show that mail pay rates have been for decades, and still are, "fixed" for past periods.[20]

What "fix" means in §406 is perfectly evident. It is used in the sense of "set," "specify," "name."[21] The

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[19] In *Eastern Rd. Co.* v. *United States*, 129 U. S. 391, an order (quoted in full *supra*, p. 4) "fixed" a mail rate for July 1, 1877, to June 30, 1881, *"unless otherwise ordered."* A later order, made on July 12, 1878, reduced the rate 5% "from July 1, 1878, to June 30, 1881." This Court held that even if the first order constituted a contract, "still, as, by the terms of both the order and the notice, those rates were to govern, 'unless otherwise ordered,' there is no ground for the company to complain of the subsequent reduction of five per cent . . . It cannot be said that the reduction of five per cent was a violation of that contract; for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such future orders as the Postmaster General might make" (p. 395). To the same effect, see *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Delaware, Lackawanna & Western Rd. Co.* v. *United States*, 249 U. S. 385, 387-388; *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 256 U. S. 610, 613-614.

[20] In fact, the Board has no difficulty in providing in the same order that a "fair and reasonable *temporary* rate . . . is hereby *fixed*, determined and published" from a stated date and that "there shall hereafter be *fixed* and determined . . . the final fair and reasonable rate or rates of compensation . . . which rate or rates shall be retroactively effective" from the same date. *Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 691-692. For other examples see Pet. Br., p. 42, notes 45 and 46.

[21] *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, indicated the meaning of the word "fix" in mail pay cases: "The statute defined a car line, but did not *fix* the compensation. It left that to be *determined* by the Postmaster General, who could have *named* any rate, not to exceed the statutory maximum" (p. 649).

Board is empowered not merely to ascertain or determine fair and reasonable rates of compensation, but to put them into effect.[22]

There is never, however, one single rate which alone is fair and reasonable. A whole "zone of reasonableness" exists.[23] All rates within that zone are reasonable. Thus, the Board distinguishes between a "need" rate and a "service" rate; the "need" rate is substantially higher.

The Act says "fix and determine." At times it appears to use the words interchangeably. Thus the first sentence of §406(b) says that in "fixing and determining fair and reasonable rates of compensation" the Board "may *fix* different rates for different air carriers or classes of carriers." The second sentence then begins, "In *determining* the rate in each case . . ." The word "determine," standing alone, might have given rise to some question, since occasionally it is used to mean "find" or "ascertain" as distinguished from "put into effect." (*Cf. United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 542: "The Board has not *ordered* a refund. It could not rightly do so, for its jurisdiction is limited to the *determination* of the amount of deficiency or overpayment . . .") Any possible doubt on that score was obviated by saying "fix and determine."

[22] *Cf. Kihlberg* v. *United States*, 97 U. S. 398: "The parties, however, concurred in designating a particular person . . . with power not simply to *ascertain*, but to *fix*, the distances which should govern in the settlement of the contractor's accounts for transportation" (p. 401); *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591: "But the Commission maintains that it has the power to make *findings* as to the lawfulness of past rates even though it has no power to *fix* those rates" (p. 618).

[23] *American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617, 624; *United States* v. *Illinois Central Rd. Co.*, 263 U. S. 515, 524; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 506; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 636; *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585-586; *Interstate Commerce Comm.* v. *Inland Waterways Corp.*, 319 U. S. 671, 685; *Ayrshire Collieries Corp.* v. *United States*, 93 L. Ed. adv. op. 220, 228 (Jan. 3, 1949).

but both are supposed to be reasonable.[24] In the case of mail pay, the Board does not merely define the zone of reasonable rates, by selecting maximum and minimum figures, as it always may (and, in some cases, must) do in the case of public utility rates.[25] On the contrary, it must specify the precise mail rate—name it, "fix" it. That is exactly what the Board does now when it revises mail rates for past periods, and what it will still do if the "make effective" clause is given its manifest meaning.

C. Other Phrases in §406.

Next the Board isolates certain phrases in §406(b), which lists numerous factors to be taken into consideration when mail rates are determined. Among other things, the Board shall consider "the need of each such carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and . . . to enable such air carrier . . . to maintain and continue the development of air transportation to the extent and of the char-

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[24] "The 'service' as opposed to the 'need' mail rate is not designed to meet the financial need of the individual carrier but rather it is intended to be fair and reasonable in terms of both the quality of the service and the reasonable and necessary costs under conditions of economical and efficient management." *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 599.

[25] The Board's power over public utility rates—passenger and cargo rates—is set forth in §1002(d) of the Act, 49 U. S. C. §642(d), quoted in Pet. Br., pp. B21-B22. When the Board may act thereunder, it "shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof)," except that "as to rates, fares, and charges for overseas air transportation" it "shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge."

acter and quality required for the commerce of the United States, the Postal Service, and the national defense."

The Board asserts that "if these words are to be given content they must limit or else conflict with the asserted meaning of the 'make effective' clause, for what is to happen in the future is hardly a proper consideration for determining the extent of payments for past services." (Res. Br., pp. 48-49). The argument borders on the frivolous. It is like saying that, in determining how much medication to give immediately to a starving man, to compensate for past deficiencies in his diet, it is entirely irrelevant whether he is to be built into a robust person or kept barely alive as a walking skeleton. To be more specific, it means that after making a rate prophecy for the future which turns out to be disastrously wrong, the Board is merely permitted to make another prophecy which may turn out to be no better than if a previous one. The evil which would result from imposing prophecy upon prophecy is made apparent by looking again at the mistake which the Board made in 1945 affecting TWA, American, United and Eastern (see Pet. Br., pp. 12-13, note 4).

Actually, when the Board fixes a mail rate for the past, of course it considers the adverse effect of insufficient pay on the airline's future ability to operate.[8] The obvious reason is that, if too little pay is given for past service, the airline may be so weakened financially that it cannot properly perform the service thereafter. "The evidence

[8] *See, e.g., Pennsylvania-Central Airlines Corp., Mail Rates*, 4 C. A. B. 22, 36; *All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 351, 362; *Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 695; *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 425; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 619.

indicates that the carrier has continuously operated at such annual deficits as to hamper its operations and the maintenance and development of its service."[27] Palliatives operating for the future may work too late; indeed, failure to adjust the rate for the past may disable the airline completely from continuing "performance of such service."[28]

D. The Contrast Between the "Make Effective" Clause and the Act's Provisions Relating to Public Utility Rates.

Section 406(a)(1) empowers the Board "to make *such* rates effective from such date as it shall determine to be proper." The Board says that the word "such" is "significant" (Res. Br., p. 49). Of course it is, but it does not have the mysterious significance which the Board seems to attach to it.

The word "such" identifies those rates, and those rates alone, which the Board is to make effective "from such date as it shall determine to be proper." The Board is not given that power with respect to "rates" generally, as

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[27] *Mid-Continent Airlines, Inc., Mail Rates*, 1 C. A. A. 45, 48.

[28] Another factor mentioned in §406(b) is "such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law." The Board suggests that the phrase "to be rendered" also shows that the rates must "apply to future operations" (Res. Br., p. 48). Manifestly all the language means is that the Board shall take into account the fact that the service for which the rate is determined must satisfy all prescribed standards. Sub-standard services are not worth as much as services up to standard, and of course the Board can take that into effect in fixing the rate for past periods. One could just as well argue that §406(a)(1) shows that rates can be fixed only for the past because they must provide "compensation for the transportation of mail by aircraft, the facilities *used* and useful therefor," instead of "the facilities to be used and useful therefor."

might be contended if "such" had been omitted. It has that power only as to those rates specified in §406(a)—the "rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith." Thus "such" makes it doubly plain that the Board has no such power over any other kind of rates.

For the Board does not dispute that the "make effective" clause is different from the provisions of the Act dealing with passenger and cargo rates. The airlines' public utility rates may be changed only prospectively. Divisions of public utility rates may be adjusted only "from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto" (see Pet. Br., pp. 18-19, 35-36). No such limitations on the Board's power were written into the broad language of §406(a)(1).

"The most likely reason for the difference between its language [*i.e.*, the 'make effective' clause] and that of other parts of the Act," the Board speculates, "is that they were prepared by different draftsmen, the 'make effective' clause being engrafted onto a completed bill" (Res. Br., pp. 71-72). The speculation ignores the practical differences between mail pay adjustments and public utility rate changes which explain the differentiation between them (Pet. Br., pp. 33-37). It attributes to the draftsman of the "make effective" clause, who discussed the entire 1937 bill at length, utter inability to distinguish between palpably different language, although in other respects he is granted extremely acute powers of discrimination. It glosses over the fact that, after the 1937 bill died without

coming to a vote, it was thoroughly studied and revised.[29] During its scrutiny, the marked differences between the mail pay and public utility rate provisions could hardly have escaped notice.

But, as the Board confesses, its speculation is really beside the point (Res. Br., p. 72). Most statutes are the handiwork of many draftsmen. Nonetheless, a statute must be construed as a whole. The breadth of the "make effective" clause must be read in the light of, and gains added significance from, the restrictive wording of other parts of the Act.[30]

II. The False Analogy to Public Utility Rate Statutes.

The Board's appeal to this supposed analogy ignores the fact that the Act's mail pay provisions do *not* "embody public utility rate-fixing concepts" (Res. Br., p. 9). One

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[29] For a detailed summary of the steps taken during the period from 1937 to 1938, see Rhyne, *Civil Aeronautics Act Annotated* (1939), pp. 51-65, 210-213, 215-220. As Representative Lea, who sponsored the 1938 bill in the House, put it: "Anyone studying the bill will find that this past bill [*i.e.*, the bill passed in 1938] is a more refined piece of legislation [than] the bill of last year [*i.e.*, the 1937 bill]. It has gone more into detail, with more care. Naturally, out of these months of controversy and study that situation has developed." *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong., 3d Sess.*, p. 310.

[30] *Cf. United States* v. *American Union Transport, Inc.*, 327 U. S. 437, 445: "In the face of such repeated demonstrations that Congress makes its purpose plain, when it actually intends to limit the coverage of others than carriers to affiliate or to persons performing part of the transportation service, *the conclusion hardly is tenable that it means the same thing when it employs more broadly inclusive language and wholly omits all such limitations.*" See also, *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 77.

such concept, and the most relevant one for present purposes, is that public utility rates are changed only prospectively, but concededly 406 does not "embody" it. On the contrary, it uses unique language found in no public utility rate statute. "White" does not mean "black," especially where Congress says "black" (when it means it) in the very same statute.

A decade ago this Court rejected one attempt to analogize procedure under public utility rate legislation to mail pay statutes.[31] Only last year, construing this very Act, it repudiated the same kind of analogy.[32] The detailed fallacies in the analogy need not be explored again (Pet. Br., pp. 27-44). A few of the Board's attempts to convert white into black, however, should be noted.

A. The Language of the Act.

1. Of course, parallel objectives are considered when fixing mail pay and reviewing the airlines' public utility tariffs (Res. Br., p. 26). It would be astonishing if it were otherwise. The different provisions of the Act were not designed to work at cross-purposes, but to promote the same national ends. Those basic objectives underlie many Federal statutes.

Nothing obliged Congress, however, always to use precisely the same road to reach its ultimate goal. It had a wide choice of alternatives between which to choose. In-

[31] *United States* v. *Griffin*, 303 U. S. 226, rejected the argument that the remedy under the Urgent Deficiencies Act should be applicable to railway mail pay orders because it applied to orders under public utility statutes "fixing rates payable by shippers" (p. 237).

[32] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 107-108 (Pet. Br., p. 44).

deed, this very Act evidences a keen differentiation between changes in mail pay rates and changes in public utility rates. That differentiation was not whimsical. It was based on excellent practical and economic reasons which the Board now ignores (Pet. Br., pp. 33-37).

2. The Board asserts that "the Act embodies substantially the same rate-making method" for determining mail pay and public utility (*i.e.*, passenger and cargo) rates (Res. Br., p. 27). Actually, the differences in the "method" are legion.

Airlines do not set and cannot change their mail pay rates. But they can and do set their public utility rates, simply by filing tariffs which they can change at will. The Board has only a supervisory action over those rates. It can suspend them and, when need arises, revise them. Even then it may always (and sometimes must) prescribe only maximum and minimum public utility rates, whereas it fixes specific mail pay rates. Most important, public utility rates can be changed only prospectively. Mail pay rate changes can be made retrospectively and prospectively.

3. The Board says that "petitioner asserts that the standards for determining mail rates are so different from those for determining rates for the carriage of persons and property as to make inapposite rules for the fixing of typical public utility rates" (Res. Br., p. 25). We said nothing of the sort. Had Congress wished to apply to mail pay the "typical public utility rate" rule that changes are made only for the future, of course it could and would have done so, however different the "standards" used to determine the rates. What we said, and repeat, is that the difference in the standards is an additional fact point-

ing up the fallacy of analogizing §406 to public utility rate statutes.

The Board admits that the so-called "subsidy" provision of §406(b) differentiates §406 from such statutes (Res. Br., p. 27). Thus, tariff rates are to be "at the lowest cost consistent with the furnishing of such service," §1002(e)(2), and "to provide adequate and efficient air carrier service," §1002(e)(5). Mail pay, on the other hand, is to be high enough, with all other revenue, to enable the airlines to maintain and develop a national air transportation system, §406(b).

The Board says that the reason why "the last clause of Section 406(b) is sometimes called a 'subsidy' provision is that it relates to the fixing of mail rates, rates which are only applicable to a single customer, the United States" (Res. Br., p. 28, note 18). That is incorrect. Railroads carry mail for the same single customer. "In the case of the railroads," however, "there has been no hint of subsidy in connection with mail payments."[33] The real reason is quite different.

Congress "knew that in the present developmental stage of the air transport industry the air carriers, in most instances, would be unable to survive without revenues from the transportation of mail sufficiently large to make up for the deficiency in revenues from passenger and express sources."[34] (Hopes that the airlines would become

[33] See *Hearings before a Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st Sess.* (hereinafter referred to as "*Subcommittee Hearings*"), p. 45. See also, *infra*, notes 39 and 40.

[34] *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 253. See also *infra*, note 39.

self-supporting without liberal mail pay have still not materialized.[35] Hence Congress provided that air mail pay should be "compensation not only for carrying the mail but for building up a system of air transportation which will serve the nation's commerce and security as well," and "the medium through which continuous financial support necessary for the carriers to fulfill the purposes of the Act is extended."[36] For that reason it is sometimes called a "subsidy."

Whatever the terminology used, the fact remains that, as the Board has pointed out time and again (see Pet. Br., pp. 37-40), radical differences exist between the Act's mail

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[35] *Cf.* the *Message of the President of the United States*, H. Doc. No. 17, 81st Cong., 1st Sess., on January 10, 1949, referring to the postal deficit (95 Cong. Rec. 154-155):

> "The remaining deficit would represent largely the costs of Government penalty mail, franked mail, *airline subsidies, and other costs not properly chargeable to the users of the postal service*. Aside from such costs, postal operations should be conducted on a self-sufficient basis, with rates maintained at a level adequate to accomplish that objective.
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> "Aviation: *Commercial aviation, the newest of our transportation industries, is still in a stage of development that requires subsidy assistance.*"

[36] *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 324, 330, 335. "In determining mail rates, under section 406 of the Act, allowance is made not only for the expenses and revenues incident to the operation of schedules required in the interests of the Postal Service, but also for the expenses and revenues incident to the operation of all additional schedules found to be required by the interests of commerce or the national defense, or both." *Braniff Airways, Inc.—Mail Rate Proceeding*, 2 C. A. B. 555, 559. Indeed, mail service can be authorized solely in the interests of national defense. See *Pan American Airways Company—Temporary Certificate of Public Convenience and Necessity*, 3 C. A. B. 47, 48; *Chicago Southern Air Lines, Inc.—Mail Rates for Route Nos. 8 and 53*, 3 C. A. B. 164, 194.

pay "standards" and those applicable to public utility rates. Those differences furnish additional proof that the analogy to public utility rate statutes is askew.

B. The Legislative History.

1. Until 1938, when the Act was passed, the air transportation industry was largely unregulated. Only a few years before, in 1934, Congress had rejected as premature a proposal for comprehensive regulation of air transport.[37] Naturally, in providing for control of passenger and cargo rates, the issuance of certificates of public convenience and necessity, and the like, Congress drew heavily on its experience in regulating other forms of transportation. On those subjects, it had no prior experience in regulating airlines. Hence many provisions of the Act "bear a striking similarity" to statutes regulating other transportation activities (Res. Br., p. 24).

Because the industry was to be placed under sweeping governmental control, like other industries, several people commented on the fact. It is very easy, therefore, to cull general statements having nothing whatever to do with mail pay, and present them, out of context, as if they bore on that subject or even on the specific problem here involved (*e.g.*, Res. Br., pp. 22-24, 32, 59).[38]

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[37] Senator McCarran's 1934 bill, referred to in Pet. Br., p. 67, note 88, contained a comprehensive scheme for regulation of the entire industry.

[38] For instance, the Board points out (Res. Br., p. 59) that Senator Truman said of the 1937 bill: "This bill is simply a regulatory measure which does for the air carriers exactly what is done for railroads and for busses and trucks. I cannot too strongly emphasize that fact." 81 Cong. Rec. 9201. Plainly all he meant was that airlines, like railroads, busses and trucks, were to be com-

Actually at no time did anybody state that the *mail pay* provisions of the Act—much less what is now the "make effective" clause of 406(a)(1)—embodied or were intended to embody any public utility doctrine. The reason is plain. Congress had been regulating mail pay rates since 1792. It had no need to look for guidance on that subject to doctrines developed in the field of public utility rate legislation. The Act's mail pay provisions were an evolution from Congress' abundant experience with mail pay.

2. Then the Board notes that the Act does not provide for direct, outright subsidies (Res. Br., pp. 28-29). Admittedly, however, it contains an indirect "subsidy" provision. The veiled intimation seems to be that the only alternative to a direct subsidy statute is a prospective public utility rate-making system. The unsoundness of that dilemma is too obvious for discussion.

3. Next the Board says that in 1937 witnesses "pointed out the similarity between the problem of fixing mail compensation for air carriers and fixing railroad rates" (Res. Br., p. 30) and the "analogy to rate-making for railroads"

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pletely regulated by the Commission; in other words, that in addition to having "the power of fixing rates for mail," the Commission would be empowered to "fix the rates for passengers, freight, and express." See his comment in *Subcommittee Hearings*, pp. 280-281. Yet this innocuous generality is pieced together with an earlier generality relating to air mail, which manifestly called attention simply to the fact that the 1937 bill was intended to change the peculiar system under the Air Mail Acts (under which the Postmaster General and the Commission had divided authority over mail pay, with a Commission-fixed rate being superimposed on a contract-fixed rate, subject to a statutory ceiling) to one under which all authority over air mail rates would be reposed in the Commission, "just as mail on railroads is treated." 81 Cong. Rec. 9202.

(Res. Br., p. 31). Apparently one is supposed to infer that the witnesses thought that railroads and airlines occupied the very same situation, and therefore that air mail pay should be treated in exactly the same way as "railroad rates," *i.e.*, passenger and freight rates.

No witness suggested any such thing. On the contrary, the witnesses made it plain that railroads and airlines occupied quite different situations, even with respect to mail transportation.[39] In fact, the Board quotes bits

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[39] In *Subcommittee Hearings* and *Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 5231*, p. 35, Commissioner Eastman pointed out one profound difference between the situation of the airlines and that of the railroads with respect to mail pay. He said (*Subcommittee Hearings*, p. 35):

> "In the case of air carriers, however, the mail service is a far more important factor than in the case of the railroads. The air lines claim, and probably up to the present time it has very largely been true, that they were created for the purpose of carrying mail, that it is their primary and essential function, and if they are to carry the mail efficiently and successfully they argue that the compensation for carrying the mail must make it possible for them to operate at a profit. The result of following this argument to its logical conclusion is similar to the result of a direct Government subsidy, because the Government's payment for carrying the mail will then insure profitable operation—always assuming efficient and economic management, of course, which the Commission would take into consideration.
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> "Whether or not this ought to be done is a matter of policy for Congress to determine. I wish to point out, however, that the present bill [*i.e.*, the original 1937 bill] is so drawn that it opens the door to this argument."

Mr. Gorrell also pointed out that mail was "still the mainstay of most airlines." *Ibid.*, p. 134. "It is expressly provided that the Commission will not be required to follow the method adopted in the case of the railroads, which has been purely a space method, as I understand it. The Commission must take into consideration the conditions of aircraft transportation." *Ibid.*, p. 137. See also his testimony quoted in Res. Br., p. 66, note 59.

of testimony intended to illuminate *differences* between the 1937 bill and the Railway Mail Pay Act over the use of mail pay as a "subsidy."[40] That testimony was designed to demonstrate that experience showed that no rates can ever be fixed in a vacuum, and that if the airlines were to earn enough total revenue to keep going, but could not derive a livelihood from carrying passengers and freight, mail rates would have to be fixed high enough to make up the difference.[41] It passes understanding how this testi-

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[40] Some of Commissioner Eastman's testimony in this respect was quoted in Pet. Br., p. 73, note 109. In addition, he prefaced that part of his testimony from which disjointed excerpts are quoted in Res. Br., p. 30, by saying (*Subcommittee Hearings*, p. 74):

> "These bills [both of them, follow *quite largely* the language in the present railway mail pay acts under which the Interstate Commerce Commission fixes compensation for carrying railway mail. *There are certain differences, however*, which were pointed out in the report which we have filed on S. 2, and *which I will endeavor to discuss a little more explicitly at this time.*"

The "report which we [*i.e.*, the Commission] have filed on S. 2" (*i.e.*, the original bill, not the substitute bill which we will call the "1937 bill," as in our main brief) had noted: "In the case of the railroads there has been no hint of subsidy in connection with mail payments." *Subcommittee Hearings*, p. 45. At the hearings, Commissioner Eastman developed the point further. See *supra*, note 39, and *infra*, note 41.

[41] This clearly appears from the testimony of Commissioner Eastman, quoted in truncated form in Res. Br., p. 30. After the statement quoted *supra*, note 39, he said that "in the substitute [*i.e.*, the "1937 bill"] you will note there is continual emphasis upon transportation of the mail" and "provisions indicating that rates must be so fixed that the carriers can operate successfully. If the rates for carrying passengers and property other than mail cannot, as a practical matter, be fixed at a level which will enable them to do their share in producing these results, then the burden must, it will be argued, fall on the mails." *Subcommittee Hearings*, p. 75. He added: "I am not so sure that that is to be regarded as a subsidy."

mony can be offered as remotely indicating that a limited meaning should be given to the "make effective" clause, which had not even been proposed at the time.

4. Of course, as the Board argues (Res. Br., pp. 36-37), Congress *could* have disregarded the historical differentiation between mail pay adjustments and public utility rate changes, ignored the practical reasons underlying that difference, and tossed into the discard generations of experience in the fixing of mail compensation for the past as well as the future. Presumably, however, in a mail pay provision Congress acted with regard to the conditions peculiar to mail pay and its past experience with that field. Presumably it did not draw a false analogy to the alien field of public utility rates.

There is no need, however, to rely on presumptions. Apt language to assimilate completely the fixing of mail

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Ibid. Then he proceeded to develop this point by an analogy. "It is a good deal like the situation with respect to the railroads. There the most important part of the service is the freight service, and . . . the railroads . . . have frequently argued to the Commission that it is impossible for them to get a fair return on the passenger business, and therefore the freight must carry that load, if they are to get the fair return; in other words, that the deficit from passenger service must be fastened on the freight service. To some extent the Commission has accepted that argument. I say 'to some extent' because in the case of the carriage of livestock, for example, it found that it was not an appropriate place to put that burden, and that the railroads should find some other place to carry that burden, other than the carriage of livestock. The situation is much the same here. Of course the Government wants the mail to be carried efficiently and well. If it should be the situation that for competitive and other reasons the passenger part of the business cannot be made to pay its way, then it follows that the companies cannot operate successfully in a financial way unless they get enough from carrying the mail to cover the deficiency on passengers." *Ibid.*, pp. 75-76.

pay to public utility rate doctrines lay at hand in this very statute. Congress could have chosen the same standards for fixing mail pay as for determining public utility rates. It did not. It could have provided that mail rates, like public utility rates, should be changed only prospectively. It did not. On the contrary, it used in § 406(a)(1) unique language vastly different from that of public utility rate statutes. That language cannot be emasculated by appealing to a false analogy which Congress did not follow when drawing this very Act.

III. The "Legislative History" of the "Make Effective" Clause.

The Board tries to pare down § 406(a)(1) by invoking its legislative history. "There is, however, no ambiguity in this Act to be clarified by resort to legislative history." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492. The argument, moreover, is fruitless. What the legislative history shows is that the "public utility" notion that mail pay rates should be changed only prospectively was vigorously advanced and rejected decisively. Instead Congress wrote into the Act a broad grant of power without any arbitrary limitations.

A. The Obligation to Carry the Mails.

Claiming that the 1937 bills (and the Act) imposed no obligation to carry mail, the Board persists in its basic premise that the "disagreement in the Commission" over its power under the Air Mail Acts to fix rates back to the date the proceeding was begun "would have been perpetuated had the 1937 bills been enacted into law without

the addition of the "make effective' clause" (Res. Br., p. 68). It admits that Commissioner Mahaffie predicated his dissenting view wholly on the argument that under the Air Mail Acts airlines were not required by law to carry the mail. (Res. Br., p. 65).

The Board's claim is unsound. It is entirely immaterial whether an airline can legally operate without carrying mail.[42] The problem whether air mail rates can be fixed retrospectively or not can never arise with an airline lacking authority to carry mail, for it may not carry mail at all. No airline may carry mail unless specifically authorized to do so by certificate.[43]

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[42] The 1937 bill provided, in §305(g): "No certificate shall be issued, and no air carrier shall hold, or operate under, *any* certificate, except upon condition that the carrier shall undertake to provide, under such rules and regulations, not inconsistent with the provisions of this part as the Postmaster General may prescribe, necessary and adequate facilities and service for the transportation of, and to transport, mail, whenever so authorized by such certificate and so required by the Postmaster General; and such carrier shall be entitled to receive compensation therefor as hereinafter provided." *Subcommittee Hearings*, p. 23. Perhaps it might be inferentially implied from §305(f), which referred to a certificate including "authority to transport such classes of traffic, except mail, as may be approved by the Commission," that an airline might be issued a certificate authorizing it to operate although not obliging it to carry mail. For the corresponding provisions of the original 1937 bill, see *Subcommittee Hearings*, p. 4.

[43] The 1937 bill provided, in §305(a): "No air carrier shall engage in interstate, overseas, or foreign air transportation or in any transportation of mail by aircraft, unless there is in force a certificate issued by the Commission authorizing such carrier so to engage." *Subcommittee Hearings*, p. 22. The corresponding provision of the Act is §401(a), 49 U. S. C. §481(a): "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." In the Act "air transportation" means "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft," §1(10), 49 U. S. C. §401(1).

While such a certificate is in existence, the airline has no choice about carrying mail. "Whenever so authorized by its certificate, any air carrier *shall* provide necessary and adequate facilities and service for the transportation of mail, and *shall* transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided."[44] If it violates that duty, it is liable to a heavy fine for each day of the violation.[45] Once a certificate is issued, it cannot be voluntarily abandoned.[46]

After an airline occupies the status of a mail carrier, therefore, it is compelled to carry mail. That the status was not forced on it originally is beside the point. Nobody can be legally forced into the status of marriage, but a man who marries is compelled to support his wife whether

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[44] Section 401(m) of the Act, 49 U. S. C. §481(m). The corresponding provisions of the 1937 bills are set out *supra*, note 42. "Air carriers transporting or handling United States mail *shall* submit, under oath, when and in such form as may be required by the Postmaster General, evidence of the performance of mail service," §405(j), 49 U. S. C. §485(j). For corresponding provisions, see §311(f) of the original 1937 bill, *Subcommittee Hearings*, p. 10, and §310(h) of the amended 1937 bill, *ibid.*, p. 29.

[45] For a first offense, the fine can be $500; for each subsequent offense, $2,000. "If such violation is a continuing one, each day of such violation shall constitute a separate offense," §902(a) of the Act, 49 U. S. C. §622(a). For the penal provisions of §316(a) of the 1937 bills see *Subcommittee Hearings*, pp. 13-14, 31.

[46] Section 401(k) of the Act, 49 U. S. C. §481(k), provides: "No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest." Similarly, a certificate cannot be revoked except for "wilful" violation of law; §401(h), 49 U. S. C. §481(h). The 1937 bills contained no express provision relating to abandonment of a certificate.

he wants to or not. Moreover, under §401(n) of the Act, once an airline accepts a certificate permitting it to carry only passengers or cargo or both, but not mail, it subjects itself to the obligation of carrying mail if the Board subsequently finds that it is in the public interest.[47]

No one had any doubt that under the 1937 bill an airline authorized to carry mail would be compelled to act as a mail carrier. Mr. Gorrell made that clear.[48] He even took the position that the airlines' duty to carry mail was *broader* than that of the railroads.[49]

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[47] Under Section 401(n), upon certification by the Postmaster General that new air mail service is needed, the Board has the power to provide for it by issuing a new certificate "or by amending an existing certificate or certificates in accordance with the provisions of this section." "This section" [§401(h)] provides that the Board, on its own initiative, may amend any certificate if the public convenience and necessity so require. Consequently once an airline accepts any kind of a certificate it immediately subjects itself to the obligation of carrying the mail if the Board wishes to require it, whether its original certificate provided for it or not.

[48] "Thus, when a carrier is authorized in his certificate to carry mail, he assumes an *absolute obligation* to transport that mail as and when directed by the Postmaster General, and under rules and regulations made by the Postmaster General." *Subcommittee Hearings*, p. 436. "Since the *obligation* placed upon the carriers by section 305(g) to furnish adequate and necessary mail service is one of the obligations imposed by the act . . . the criminal penalties for violations of the act are likewise applicable." *Ibid.*, p. 463.

[49] "On the other hand, with respect to the mail service, section 305(g) says specifically that the carrier must transport the mail 'whenever . . . required by the Postmaster General.' It also provides that adequate service must be given under the Postmaster General's rules and regulations. *This is a power much greater than that which he possesses with respect to the railroads.* As to them it is provided merely that a railroad company must transport mail 'when required by the Postmaster General on any train or trains it operates.' That is taken from 39 U. S. C. A. section 539." *Subcommittee Hearings*, p. 442.

Thus, even without the "make effective clause," the 1937 bill completely cut the ground from under Commissioner Mahaffie's dissenting argument. The point on which he disagreed with the Commission could have arisen only when an airline was lawfully carrying mail. Under the 1937 bill, every such airline was placed under a penal, statutory duty to carry mail.

Not even Commissioner Mahaffie could have made the arguments against all retrospective adjustments of mail pay advanced in his dissent in *Air Mail Compensation*, 216 I. C. C. 166, 192. No longer could he have continued to argue that "carriage of the mail by railroads is required by law. Refusal is punishable by a fine," whereas "air mail is carried by contractors. The air line is under no compulsion to become a contractor. It may, on 60 days' notice, terminate its contract, and end its undertaking to carry mail." The 1937 bill abolished the whole system of a voluntary contractual relationship. It substituted a compulsory, non-terminable status relationship enforceable by criminal penalties. The Board's basic premise is completely unsound.[50]

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[50] It is unnecessary to explore the Board's attempt (Res. Br., p. 64) to show that the 1937 bills did not eliminate the "minutiae of expression . . . that show Congress to have been thinking of the future" carried over into the Air Mail Act from the Railway Mail Pay Act. They are apparent from a comparison of the statutes (Pet. Br., pp. 49-51, 59-61). Indeed, reenactment of the statute without change would have been an acceptance by Congress of the Commission's settled construction "which had been so clearly brought to its attention". *United States* v. *Zazove*, 334 U. S. 602, 623; *cf. Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 449-450.

B. The Broad Disagreement as to the Commission's Retrospective Power to Fix Mail Rates.

1. The Board thinks that under the Air Mail Acts the only disagreement in the Commission was over "the narrow question of whether the Commission had authority to fix mail rates back to the date of the petition or whether it was restricted to making such rates effective from the date of issuance of an order" (Res. Br., pp. 69-70). There are two errors in this position.

First, the Board does not cite a single case to support its intimation that, under the Air Mail Acts, the Commission held or said that it could go back *only* to the date of the petition. Actually it went back even further.[51]

Second, in all the cases where the Commission did fix rates back of the date of the petition, Commissioner Mahaffie dissented. He predicated his first dissent on the broad ground that the Commission had "no authority in

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[51] The Board dismisses certain decisions reviewed in Pet. Br., p. 58, note 72, on two grounds. First, the retrospective "action was taken by the Postmaster General and not the Commission" (Res. Br., p. 54, note 40). The mechanics of the retrospective adjustment are immaterial. The important thing is that under the statute the Commission had power to issue orders which were made effective far back of the start of the proceeding. Had the Postmaster General doubted the Commission's authority to make such orders, he would have refused to pay thereon, as in the *New York Central* case. Second, it suggests that the action was "*apparently* based on Section 6(c) of the Air Mail Act of 1934, as amended." Nothing in that section required that compensation under a revised Commission-fixed rate be adjusted retrospectively as far back as March 1, 1935 (*cf.* Pet. Br., p. 57, note 71), and the action taken shows a liberal interpretation of the section standing in sharp contrast to the Board's present narrow view of §406(a)(1).

the act for making the increases retroactive,"[52] and continued that position throughout.[53] In other words, he took the view that the Commission should fix rates only for the future, just as under public utility rate statutes.[54]

2. The Board concedes that disagreement was voiced by "witnesses and legislators" during the 1937 hearings over the broad principle whether the Commission had any power to fix rates retrospectively, not over the narrow question here involved (Res. Br., pp. 70-71). It suggests that the argument somehow "became narrowed" and then Mr. Gorrell "resolved the issue." The fact is that all

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[52] *Air Mail Compensation*, 216 I. C. C. 166, 191. "By construction, the majority import into the statute a power contrary, in my opinion, to its express terms." *Ibid.*, p. 192.

[53] The discussion (Res. Br., pp. 68-69, note 62) of *Air Mail Rates for Route No. 33*, 216 I. C. C. 381, ignores the very first sentence of the dissent: "As I pointed out in my separate expression in Air Mail Docket No. 1, decided June 6, 1936 [*i.e.*, *Air Mail Compensation*, 216 I. C. C. 166, 191, *supra*, note 52] *I find nothing in the law under which we operate that authorizes us to prescribe compensation retroactively*" (p. 403). Perhaps Commissioner Mahaffie was wrong in not agreeing with the Board that the 1935 Act "specifically conferred power to fix rates back to March 1, 1935," but that is what he thought. The discussion of the dissent in *Air Mail Compensation*, 222 I. C. C. 602, 610, puts words into Commissioner Mahaffie's mouth. He did not refer at all "to the date a petition was filed" (Res. Br., p. 69, note 62). "The chief question here is whether, under the terms of the act, we are authorized *retroactively* to change rates of compensation previously determined by us and paid by the Postmaster General. For the reasons stated in my separate expression in 216 I. C. C. 166, 191, I am unable to agree that we have that power" (italics the Commissioner's). Nor is there any reason to suppose that, because he did not discuss the *merits* of the change effected by the retrospective addition of the proviso, he ignored that phase of the majority's holding.

[54] In *Air Mail Compensation*, 216 I. C. C. 166, 192, he relied on a case dealing with public utility rate changes.

he did was to concentrate, for tactical reasons, on that one aspect of the "general problem of retroactivity" on which he had a decision of this Court to support him, whereas on other phases he could rely only on the general reasoning which he also advanced (Pet. Br., p. 70, note 104). No person can unilaterally "resolve" a broad question previously raised by others. None of Mr. Gorrell's adversaries receded from or "narrowed" their broad position. After he finished testifying, the debate remained, as before, one over the general principle of prospective vs. retrospective rate-fixing.

So, too, the Board is simply wrong in saying that Mr. Gorrell "expressed an intention to grant the Commission authority to make its mail orders effective as of the date a mail rate proceeding was initiated, *and nothing more*" (Res. Br., pp. 61-62). Neither he nor anyone else at these hearings ever said that the Commission had or should have only such limited power. He expressly referred to authority to fix "appropriately" the effective date of its rate decisions. For all that appears, he had in mind the fact that, since the 1937 bill omitted the specific provision whereby rates were fixed retrospectively to March 1, 1935, a past date which Congress had deemed appropriate, it would be desirable to replace it with a general provision preserving like broad power to go back retrospectively to a past date which the Commission determined to be appropriate.

If Mr. Gorrell had half the keen powers of discrimination with which the Board credits him, it must have been obvious to him that the power "to make such rates effective from such date as it shall determine to be proper" was palpably broader than the limited intention now foisted on

him. He did not have to add, "this language means just what it says." But the point is not worth further discussion. It is a novel theory indeed that the broad, clear language of a statute can be vitiated by ascribing to Congress in 1938 a narrow "intention" derived in turn by imputing it, by a process of divination and speculation, to a private witness who testified in 1937 on a bill which never even came to a vote.

C. The "Legislative History" After the 1937 Hearings.

The Board says that Mr. Gorrell "is the only person who ever explained or even commented on the 'make effective' clause during the entire legislative consideration of the Act" (Res. Br., p. 62). Nonetheless it struggles to make it appear that its interpretation of what he meant received an official accolade, *sub silentio*, in 1937. To do this, it tears out of context utter generalities having nothing to do with the "make effective" clause (Res. Br., p. 5[illegible]).[55]

Then the Board makes the fanciful argument that all of Mr. Gorrell's testimony was "incorporated by reference" during the 1938 hearings (Res. Br., p. 63). While it would not make any difference if the fact were as stated, actually all he said in 1938 was that he would not cover the points covered the previous year—which comprised over 200 pages of varied comments. There is nothing to show that any member of Congress ever referred in 1938 to the 1937 Gorrell testimony. In short, the Conference Report (Pet. Br., p. 45) is the only expression by Congress on 406(a). While the Board tries to dismiss it as a

[55] These generalities have been noted before (Pet. Br., p. 72, notes 107 and 108; *supra*, note 38).

"generality," it certainly shows that the section was taken at its full face value.

The legislative history proves that the "make effective" clause means just what it says.

IV. The Board's Previous Rulings.

From the outset the Board has regularly fixed mail rates for the past. Often it has been as occupied with fixing rates for past periods, frequently covering several years, as in fixing future rates.

Never before did the Board deny that it had the power to fix rates back of the date of the proceeding. Even if it had never exercised that power, its inaction would not show that the power was non-existent.[56] Actually, however, it has invoked that power repeatedly (Pet. Br., pp. 85-98).

That the Board did not say forthrightly that it was deviating from its "general policy" is immaterial. Actions speak louder than words. Power is not wielded any the less because its exercise is cloaked by using magic words like "temporary," or "provisional,"[57] or "system,"[58] or

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[56] "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." *Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352; *United States* v. *American Union Transport, Inc.*, 327 U. S. 4[illegible] 455, note 18. *Cf. The Mail Divisor Cases*, 251 U. S. 326, 332-335.

[57] This was the abracadabra employed in *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), mentioned in Pet. Br., p. 86, note 127. There the Board held it had power to go years back of the filing date of the petition to supersede a contract rate which had been in effect all along.

[58] In *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, the Board found that since the airline had received "excess earnings" on its other routes "which greatly exceeded the

by resorting to polite fictions in "reopening" proceedings and issuing "amended" or "revised" orders, or deeming a petition filed "*nunc pro tunc*" a date earlier than its actual filing.[59]

In §406(a)(1) the Act confers on the Board, in plain English, ample power to reach directly all the results which it now feels obliged to justify by fictions and charmed words. When one looks to what it has actually done, it is perfectly manifest that it has repeatedly exercised that power. It is hardly surprising that, even after this pro-

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requirements of the Alaska division, respondent had no 'need' for which it may be paid additional compensation" (p. 67). Nonetheless, because it decided not to set rates for the new Alaska operations on a "system" basis, it held that "we cannot refrain from fixing the minimum compensatory rate in this proceeding on the ground that such earnings exist elsewhere" (p. 68). When the Board wishes to fix rates on a "system" basis, however, it feels at liberty to give the airline nothing for carrying mail on the new route when it thinks it has earned too much mail pay on the old routes. See Pet. Br., p. 94.

[59] The Board struggles (Res. Br., pp. 78-79) to explain away its 1942 memoranda (discussed in Pet. Br., pp. 87-88). Presumably it preferred not to say bluntly that it was making an exception to its "policy" because it thought that, if it did so, airlines might misinterpret its action as encouragement to apply for retrospective relief on baseless grounds. No matter why it favored indirection, however, the fact remains that the Board invited airlines to file petitions asking for relief which it now says it could not lawfully grant. Its present "fair play" argument is irrelevant to the question of power. "It is beyond the judicial power to distort facts or to disregard legislative intent in order to provide equitable relief in a particular situation." *Bochm* v. *Commissioner of Internal Revenue*, 326 U. S. 287, 295. Administrative power is hardly greater than judicial power. Moreover, the Board's arguments have no possible application to *United Air Lines Transport Corp., Mail Rate Proceeding*, 3 C. A. B. 289 (discussed in Pet. Br., p. 89), where the same *nunc pro tunc* device was employed. The Board ignores that decision.

ceeding was begun, the Board's own Public Counsel flatly stated "the Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding" (see Pet. Br., p. 24).

V. The Board's Policy Arguments.

The Board's brief is heaped with policy arguments designed to show that Congress should not have given it the broad power to make mail pay rates "effective from such date as it shall determine to be proper" after hearing all the facts. "But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44. Fundamentally the Board's quarrel is with the policy expressed in §406(a)(1). "But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy." *Hilton* v. *Sullivan*, 334 U. S. 323, 339. The policy arguments are, moreover, untenable as well as irrelevant.

A. The "Waste of Time" Argument.

The Board asserts that, unless the "make effective" clause is whittled down as it proposes, the whole "rate-making method . . . would be completely eliminated" (Res. Br., p. 39). A contrary view, it protests, would "render meaningless the work of the Board in this field for the past ten years" (Res. Br., p. 17), for the Board hardly "would expend time, effort, and money to fix future rates" if the Act required it "to replace all such determinations [*i.e.*, its future rate prophecies] with the results

taken from audits after the facts became known" (Res. Br., p. 82). Indeed, the "rate-making process would lose all significance" (Res. Br., p. 85).

Underlying this rhetoric are several glaring fallacies.

1. All the Board's mail pay rate predictions need revision sooner or later. When they are revised, necessarily the Board looks to the results of past operations.[60] But it does not merely replace one rate prophecy with another, as a public utility rate-fixing body must do because of practical exigencies. For the choice is not, as the Board contends, between leaping from prophecy to prophecy and abandoning the entire effort to fix future rates as a waste of time. There is a middle ground between those two extremes, and the Board occupies it right now.

When a mail rate prophecy is superseded, it is not "replaced" merely for the future. Concededly the Board replaces it for the past as well, by a retrospective adjustment of mail pay for the period back to the start of the proceeding. Its determination is, of course, based on "the results taken from audits after the facts became known." Yet the rate-making process does not go up in smoke, or become a waste of "time, effort, and money."

In short, the dilemma propounded by the Board is false. Rather the issue is whether, when superseding a prophecy as of a past date, the Board's hands are tied so that it is limited to going back to the day when the proceeding starts, or whether it is free to go back to the time when

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[60] "In fixing a rate for the future, however, we must necessarily consider the results under existing rates during the past, and whether there be a deficiency, a just profit, or an excess profit, we look at the results for guidance in redetermining the rate." *Braniff Airways, Inc.—Mail Rates for Routes Nos. 9, 15 and 50*, 3 C. A. B. 633, 636.

the rate actually became unreasonable. The Board's rhetoric only obscures that issue.

2. If the Board's prophecies were always as wide of the mark as the rate involved here (Pet. Br., p. 12, note 4), it would be eminently sensible to abandon the entire effort to set future rates. But there are excellent reasons why it is not a waste of time and money to fix rates for the future.

Airlines need mail pay to keep operating. They are paid by the Postmaster General, and his only authority for making payment appears in §406(a)(3), which provides that "the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft."[61]

Hence "under the Civil Aeronautics Act, the Post Office Department cannot pay for mail service rendered by an air carrier except upon an order of the Board fixing and determining a rate of mail compensation."[62] "In the absence of any mail pay the cost of the mail service necessarily dissipates the respondent's available working capital."[63] Manifestly it would not be a waste of the Board's "time, effort, and money," therefore, to fix a future mail rate, if the "make effective" clause is taken at its face value.

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[61] 49 U. S. C. §486(a), quoted in Pet. Br., p. B9. This is the only general mandate to the Postmaster General.

[62] *Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687, 689. See also *American Overseas Airlines, Inc., Mail Rate*, 7 C. A. B. 623, 625, and the cases cited *infra*, note 63.

[63] *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 425; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 619.

Only by fixing such a rate could the airline get the mail pay currently needed to enable it to perform the service which is to fulfill the Act's objectives.

3. But the errors in the Board's argument go far deeper. If the "make effective" clause is given its plain meaning, the Board would not have to "replace all such determinations" (*i.e.*, its rate prophecies) "with the results taken from audits made after the facts became known" (Res. Br., p. 82). It would have to do that only if its prophecies were invariably wrong—in which event it certainly would be absurd to spend much time formulating them. So long as a rate prediction remained within the broad "zone of reasonableness," it would need no replacement. Hence there would be real point in making a careful effort to fix a fair future rate, instead of picking a figure out of thin air.

4. Another variant of the Board's argument is that all the Board's future rates would become "merely tentative" or "tentative determinations" (Res. Br., pp. 41, 49). But the Board does not deny that it has *power* to set "temporary" rates for any and all airlines. Indeed, in 1942 it proposed precisely that procedure for the entire industry.[64] It did not think then that the "rate-making process" would thereby lose "all significance." Nor does it lose its "significance" or become "meaningless" now, when many rates

[64] In its 1942 memorandum, quoted in Pet. Br., p. 99, it proposed that "all rates effective on and after the date of the change-over to the new service pattern should be temporary in character, and should be subject to review and adjustment as to such period as experience may show the necessity for adjustment after a reasonable period of time."

are avowedly "temporary" and revised retrospectively for many years.[65]

From a policy standpoint, a system of purely "tentative" rates would be preferable in this industry to one of sacrosanct "final" future rates, if choice had to be made between those two extremes. Actually no such choice is required. Once again the Board is posing a fictitious dilemma.

A "temporary" rate reflects a quick, tentative estimate. No one has to prove that it should be revised. It shows on its face that revision is expected. Even when events reveal, when it is up for revision, that it came within the "zone of reasonableness," it is entitled to no weight. Since it was a purely provisional guess, it has no real probative significance. Hence the "temporary" rate need not be accorded any respect, and the definitive rate may be placed anywhere within the zone of reasonableness that the Board determines proper.

When a definitive rate is set, however, the Board may act quite differently. It need not treat it as casually as a tentative estimate. It may, for example, accord it a presumption of fairness. It may impose on an unduly

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[65] The "temporary" rate fixed on October 18, 1946, in *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, retrospectively as of February 5, 1946, provided that the proceeding would remain open until the Board fixed "a final rate retroactive to February 5, 1946, which said final rate may be higher or lower than the temporary rate fixed herein" (p. 426). Three years have gone by and no "final rate" has been fixed. Admittedly when the Board comes to fix that "final rate" it will have to examine *all* TWA's revenues from all its routes back to February 5, 1946 (Res. Br., p. 76, note 68). Yet it maintains that it is limited to examination, as far as the rates on the domestic routes are concerned, and is powerless to adjust those rates in accordance with the results of its examination.

dilatory petitioner the burden of proving the rate's unfairness.[66] If the facts show that the rate was within the zone of reasonableness, it may decline to revise it retrospectively. Indeed, it may exercise its discretion that way even though, if it were fixing the rate for the first time, it would choose a different figure within that zone.

Thus it simply is not true that the Board's predictions must be regarded as infallibly correct, up to the start of a new proceeding, or else become completely meaningless or merely "tentative" estimates. The time when a rate becomes unfair does not depend on the accident whether a rate proceeding is pending when it ceases to be fair. If that time falls while a proceeding is pending, admittedly the Board has power to adjust the rate back to the date when it actually became unfair. Congress decided that the Board should have equal power to make the same adjustment, as of the same date, whether or not a proceeding chanced to be pending then. The "make effective" clause confers precisely that power.

B. The "Finality" Argument.

The Board says that its concededly retrospective rate adjustments "do not destroy the finality of previous orders," cover only the limited time necessary to determine a new

[66] In *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), the Board held it had power to fix a rate higher than that provided in a contract, and make the increase effective back to January 1, 1943, although the petition was not filed until September 4, 1945. But it was not "unmindful of the fact that the carrier waited such a long time to file its petition" and had not "expressed its dissatisfaction" sooner. Accordingly, it held that "the carrier must shoulder the burden of coming forward with proof of the inadequacy of the compensation it has been receiving to the time of its filing a petition," and that "the Board will scrutinize meticulously the evidence with respect to the period prior to the filing of the petition."

rate, and are normally accompanied by" a future rate (Res. Br., p. 15).

If the "make effective" clause is construed according to its terms, the retrospective rate will "normally" be accompanied by a future rate. The Board's reference to the "limited time necessary to determine a new rate" can hardly have been intended seriously. Its retrospective adjustments often are made for two or three years, and even longer. Moreover, as already seen, the Board always looks to the experience of the past. The sole question is whether it is confined to looking at that part of the past which precedes the filing date or whether it may also act on it in appropriate cases.

As for the "finality" point, little need be added to our previous discussion (Pet. Br., pp. 74-77).[67] Whenever the Board supersedes a rate retrospectively, it destroys its "finality" for the past *pro tanto*. Whether it is willing to face the fact or not, it *does* retrospectively "superimpose

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[67] The Board makes no effort to support the fictitious presumption against "retroactivity" relied on below, but suggests that the Court was "simply drawing an analogy between the uncertainty created by" a retroactive statute "and the uncertainty created by TWA's interpretation of this statute" (Res. Br., p. 41, note 30). The Court drew no such analogy, and none exists. Interpreting §406(a)(1) correctly creates no "uncertainty." In this field, future rates necessarily are extremely uncertain guesses. Had Congress wished to confer on them a fictitious infallibility, it would have frozen them for a limited time, like railway mail pay rates. Certainly it would not have used the broad language of the "make effective" clause.

The Board's "protective petition" discussion (Res. Br., pp. 90-93) completely misses the point. Whether such petitions have been, should be or will be filed frequently has nothing to do with the indisputable fact that the Act permits them to be filed, showing that no "finality" is accorded to future rates. Moreover, the Board ignores the fact that, by terming a rate "temporary," it can always destroy its "finality."

new rates on rates previously and finally fixed" (Res. Br., p. 85). Doubtless public utility rates have a kind of "finality," in the sense that they are not changed retrospectively (Res. Br., p. 34). That is not because there is some virtue in inflexibility, but because of the necessity resulting from the exigencies of the situation, which simply do not exist in the case of mail pay (Pet. Br., pp. 33-36). Recognizing that fact, this Act does not accord any such "finality" to air mail rates.

C. The Guaranteed Profit Argument.

Ostensibly to illustrate a policy argument, the Board suggests that its 1945 rate prophecy, formulated on rosy guesses of revenue, was very generous; the implication is that it did not prove unreasonably low, although the petition alleges the contrary. It insinuates that since TWA did not appeal, it accepted "the theory of regulation which those rates embodied" (Res. Br., p. 39), although there was not the slightest intimation in its 1945 opinion of the Board's present position, and TWA could not have questioned a non-existent gratuitous dictum to that effect by taking an appeal. It implies that TWA should have sought relief earlier, although its 1945 opinion itself shows that TWA was adjured not to complain even though "on the basis of reported results for selected short periods the rate may appear either unduly high or unduly low" (Res. Br., p. 6).[68] It says that TWA is really asking that the "ground should once again be retraced" (Res. Br., pp. 38-39), and

[68] *Cf. Macon, Dublin & Savannah Rd. Co. v. United States*, 78 C. Cl. 251 (Pet. Br., pp. 51-52); *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), *supra*, note 66; and the new route cases in which the Board granted retrospective relief back of the institution of the proceedings, although the airlines could readily have filed petitions long before (Res. Br., pp. 85-86).

"really seeks" a guaranteed profit, or a guaranty against losses, on all its past operations (Res. Br., pp. 19, 40, 44).[69]

These groundless innuendoes only divert attention from the real issue. The sole question here is whether, if the Board determines, after an examination of the facts which developed after the rate prophecy was made, that the prophecy turned out to be false, it has power to *adjust* the rate in the light of actualities to provide "reasonable compensation."

If Congress decided that the development of an air transport system was so vital to the country's security and other national interests that mail pay should be used to guarantee efficient airlines a profit or insure them against losses, the wisdom of its conclusion would not be reviewable here. "Congress, not this Court or the other federal courts, is the custodian of the national purse." *United States* v. *Standard Oil Co.*, 332 U. S. 332 U. S. 301, 314.

But how TWA's "reasonable compensation" should be computed, after the facts are examined, is not in issue now. That question will be for the Board to determine in the first instance, after a hearing on the facts. This Court is not being asked, and could not possibly decide, that presently hypothetical question. It is entirely irrelevant here whether an adjusted reasonable rate would or would not entitle TWA to a guaranteed profit or a guaranty against losses, either on all its operations or on its mail operations;

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[69] The Board's pretended horror at the "cost plus" spectre which it conjures up stands in ironical contrast to its statement in *Western Air Lines, Inc.*, Order No. E-2333 (Dec. 30, 1948), quoted in Res. Br., p. 92, note 89. There the Board, proposing to punish the airline for keeping a "protective petition" on file by reducing its mail pay retrospectively back to 1944, said: "The effect of keeping the mail rate constantly in issue through the device of 'protective' petitions, is to place the carrier *on a cost plus basis*" (p. 5).

or conceivably be some other rate which might fall within the zone of reasonableness. The Board has held that it is powerless to make *any* adjustment in the rate even though it was unreasonably low.

Nobody contends that "Congress gave the Board a blank check" (Res. Br., p. 44). It prescribed the standards which the Board should consider in determining fair and reasonable rates of compensation. Admittedly the Board applies those standards retrospectively when it revises an avowedly "temporary" rate or adjusts mail rates back to the date when a proceeding was begun. All that TWA "really seeks" is that the Board apply the very same standards, in the very same way, back to the date when it claims the rate became unreasonably low. The Board would not guarantee profit or underwrite losses any more in one situation than another. It would not have to give any more weight to an audit of proper costs than it gives right now when making its concededly retrospective adjustments. The whole argument is entirely specious.

D. The Rate Reduction Argument.

1. The Board says that the exercise of a power to reduce rates would remove "all incentive toward managerial efficiency and the development of nonmail revenues," and prevent airlines from planning for the future (Res. Br., p. 42). These avowals of solicitude may be contrasted with its proposal, made barely a month ago, to punish an airline for keeping a "protective petition" on file by reducing its *1944* rate.[70] The Board said nothing at all about the removal of "incentive" or the effect on the airline's plans.

[70] In *Western Air Lines, Inc.*, Order No. E-2333 (Dec. 30, 1948), the Board proposed to recapture "relatively high profits received" in 1944 (p. 4), for the reasons quoted in Res. Br., p. 92, note. 89.

Nothing in the Act remotely suggests that Congress sought to inspire airlines to greater efficiency by assuring them complete immunity against recapture of exorbitant mail pay. The airlines have ample incentive to efficiency without that immunity, if only because §406(b) of the Act specifically provides that mail pay is based on the exercise of "honest, economical, and efficient management." The inducement held out to them was "reasonable compensation," not exorbitant compensation.

2. Of course the Board would not "*have to* recapture excessive profits earned in the past" if it determined after a hearing that this would defeat the purposes of the Act.[71] Later it admits this but argues that "the vice of the situation lies in the existence of the power as much as in its exercise, for its mere existence gives rise to uncertainty" (Res. Br., p. 43). But the Board concededly now has, and occasionally exercises, the power to reduce rates retrospectively back to the date of the proceeding. Yet the "uncertainty" supposed to be engendered from the existence of that power has not served to reduce the airlines' incentive to efficiency, or prevented them from planning for the future. If the Board thinks otherwise, it should ask Congress to deprive it of all power to reduce mail pay retrospectively.

E. The Uniform Rate Argument.

The Board asserts that, if the "make effective" clause is interpreted as it reads, airlines would have no "incentive to live" within a uniform rate set for several "carriers

[71] See, *e.g.*, *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 561; *American Airlines, Inc., et al. Mail Rates*, 4 C. A. B. 90, 92-93.

with similar characteristics" (Res. Br., p. 44). Section 406(b) of the Act does not require, but only permits, the Board to fix a uniform rate for a class of airlines. If the Board's experience with uniform class rates is any criterion (see Pet. Br., pp. 12-13, note 4), their value is highly dubious. But the argument is basically unsound, since an airline could never obtain "relief from the uniform rate" if it did not try to live within it, for it would not be operating "under honest, economical, and efficient management." Besides, when events operate entirely differently on the members of a "class," the preconceived pattern of uniformity must yield to the logic of events.

F. The Constitutional Point.

Whether air mail carriers were placed under the same "abrupt legal compulsion imposed on the existing railroads by the Railway Mail Pay Act" (Res. Br., p. 96) is utterly immaterial. The controlling fact is that, as already seen, once an airline occupies the status of an authorized mail carrier, it is forced to carry mail. Therefore its right to compensation *is* defined by the Fifth Amendment.

In *United States* v. *New York Central Rd. Co.*, 279 U. S. 73, the Court did not express "the opinion that no constitutional right accrued until a petition challenging the rate was filed" (Res. Br., p. 94). That question was not at issue there. The Court merely pointed out, for purposes of discussion, that the situation before it was different from the point arising here.[72]

---

[72] Doubtless constitutional rights can be waived, but whether they have been waived raises a question of fact, which has not yet been examined. *Cf.* the cases cited *supra*, note 68.

The dissimilarity of the public utility cases to which the Board refers has already been shown (Pet. Br., p. 80, note 119). No case cited by the Board held that, when it is practically feasible to adjust compensation for compulsory services rendered in the past, the Constitution permits it to be fictitiously frozen at an unreasonable figure. The Act should be construed to avoid the serious constitutional question which arises under the Board's construction.

Summary

The Board really asks this Court to sit as a super-legislature, choose between the numerous policies which were open to Congress, and rewrite the Act so as to substitute for the broad power of §406(a)(1) the words used in one of the public utility rate provisions of the statute. "We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute . . . However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 493. The plain language of this Act gives the Board the power denied it by the decision below.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the proceeding remanded to the Board for a hearing on the merits.

Respectfully submitted,

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Dated: New York, N. Y., February 8, 1949.

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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1948

TRANSCONTINENTAL & WESTERN AIR, INC.,
PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

Petitioner seeks a writ of certiorari to review a unanimous decision of the Court of Appeals for the District of Columbia affirming an order of the Civil Aeronautics Board dismissing a petition of Transcontinental & Western Air, Inc., insofar as TWA requested an increase in its domestic mail rate effective prior to the date of institution of the proceeding.

On March 14, 1947, TWA filed a petition with the Board, pursuant to Section 406 (a) of the

Civil Aeronautics Act of 1938,[1] requesting that the Board determine fair and reasonable rates of compensation for the transportation of mail over certain designated routes (R. 8-11). The petition set forth that the rates of compensation currently applicable had been prescribed by the Board by a final order dated October 26, 1945, but asserted that such rates were not, after January 1, 1946, fair and reasonable (R. 10) because of factors commonly affecting all air carriers (rising costs and decreasing loads), and also because of two adverse occurrences (the grounding of Constellation aircraft and a strike of pilots) which affected only TWA (R. 8-9).

The Board, one member dissenting (R. 92-108), granted the motion of public counsel for dismissal of so much of the petition as requested that the Board adjust upward the rate in effect prior to filing of the carrier's petition (R. 60-91).[2] The Board considered that the language and the legislative history of the Civil Aeronautics Act disclosed Congressional intention to apply public utility regulatory principles to the airline in-

---

[1] 52 Stat. 998, 49 U.S.C. 486 (a). The provision, in part, directs the Board, upon the petition of an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft * * * and to make such rates effective from such date as it shall determine to be proper * * *."

[2] The Board did not dismiss that part of the petition requesting an increase in rates commencing with the date of the petition, and proceedings thereon are currently pending before the Board.

dustry by fixing prospective mail rates which afforded opportunity for, but did not guarantee, a fair return (R. 68-70). It believed that Congress did not intend to grant the Board power to change a final rate retroactively because the exercise of such power would destroy the finality of all mail rate determinations, would require the Board to recapture excessive profits as well as to reimburse for past losses, would materially lessen competitive incentives in airline operations, and would adversely affect the financial stability of airline operations since the propriety of rates for prior years would be continuously open to challenge, either as excessive or insufficient (R. 79-81). Such views were among the grounds given by the Court of Appeals for affirming the Board's order (R. 111-115).

While the Government believes that the decision of the Court of Appeals is clearly correct, and while the decision is not in conflict with that of any other Court of Appeals, the question is of such importance in the administration of the Civil Aeronautics Act that its prompt final determination by this Court would seem to be in the public interest. The considerations leading to this conclusion are set forth in a letter to the Department from the Chairman of the Civil Aeronautics Board, which states in part:

> * * * Under the Act, it is possible for another carrier to appeal this same issue to another

circuit court of appeals which might reach the opposite conclusion. If the Supreme Court should then grant certiorari and decide that the Board has legal power to revise final rates retroactively, the Board would be involved in administrative complications which might require years to straighten out. Moreover, until the matter is settled beyond dispute, the financial status of air carriers as related to their right to retroactive mail compensation is uncertain. In addition, if the Act were ultimately construed to require the Board to revise final mail compensation retroactively, the Board may desire to seek legislation at once amending the statute. It is better for the Board to know definitely its powers and obligations now rather than at some future period when substantial amounts of retroactive mail pay will have accrued if the decision in the Court below is not sustained.

For the reasons previously stated, the Government does not oppose allowance of the petition for certiorari.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER, 1948.

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 111) is reported at 169 F. 2d 893. The opinion of the Civil Aeronautics Board (R. 63) is reported at 8 C. A. B. (No. 52) 685.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1948 (R. 116). The petition for a writ of certiorari was filed on October 30, 1948, and was granted on December 6, 1948 (R. 118). The jurisdiction of this Court rests on 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the Board has authority under the Civil Aeronautics Act to fix a new mail rate to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail-rate proceeding.

STATUTES INVOLVED

The statutory provision which is basic to the decision of this case is Section 406 (a) and (b) of the Civil Aeronautics Act of 1938, as amended,[1] which will be referred to as the Act. It provides:

> SEC. 406. (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to

[1] Act of June 23, 1938, c. 601, 52 Stat. 977, 54 Stat. 1235 (49 U. S. C. 401, *et seq.*).

make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and together with all other revenue of the air

> carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Other pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 100-108.

STATEMENT

A proper appraisal of the issue presented by this case necessitates an understanding of the facts relating to TWA's mail rates since January 1, 1945.[2] On that date the Board directed TWA, and the three other largest domestic air carriers, to show cause why their mail rates should not be reduced from 60 cents to 32 cents per ton-mile of mail carried. On August 13, 1945, with the termination of the war, the Board issued an amended statement of tentative findings and conclusions substituting a tentative mail rate of 45 cents per ton-mile for the rate of 32 cents previously proposed. TWA raised no objection to this latter proposal. Public hearing was held on September 14, 1945, at which the data underlying the Board's proposals was submitted for the record. The case was then submitted to the Board for decision.

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[2] *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595 (October 26, 1945).

In its opinion, the Board discussed the changed circumstances resulting from the cessation of the war between the date of its original show cause order and its final order; it appended indices of selected operating statistics both actual and estimated for the future, and exhibits showing operating results and investment requirements, both actual and estimated for the future; it considered the similarity of costs and operating patterns for the four largest carriers, and upon such evidence and other factors decided to continue in effect uniform "service" rates[3] for such carriers;[4] and finally it considered the cost of the mail service.

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[3] The Board has developed two types of mail rates—the "service" mail rate and the "need" mail rate. The "service" rate bears a direct relationship to the cost of the mail service for which the rate is to be fixed. The "need" rate, on the other hand, is concerned with the deficiencies of the carrier's nonmail services and the amount of mail pay needed to maintain it in the sound condition contemplated by the Act. Burt and Highsaw, *Regulation of Rates in Air Transportation* (1946), 7 La. L. Rev. 1, 378, et seq.; *American Airlines, Inc., Mail Rates*, 3 C. A. B. 323, 337–338 (1942); *Braniff Airways, Inc., Mail Rates*, 4 C. A. B. 588 (1944); *Northwest Airlines, Inc., Mail Rates*, 4 C. A. B. 515 (1943).

[4] Although the cases of the "Big Four" were not consolidated, the decisions in all of the cases were rendered on the same date and fixed identical "service" mail rates for the carriers involved. See also *American Airlines, Inc., Mail Rates*, 6 C. A. B. 567 (1945); *United Air Lines, Inc., Mail Rates*, 6 C. A. B. 581 (1945); *Eastern Air Lines, Inc., Mail Rates*, 6 C. A. B. 551 (1945).

In conclusion, the Board stated as follows (6 C. A. B. 601–2):

> In our consideration of the fair and reasonable service mail rate we have given weight to the many uncertain short-run factors related to the transitional period as well as to the extraordinary circumstances and conditions in the air-transport industry which will materially affect the problems and attending risks which will confront management in the immediate future. A successful bridging of the difficult transitional period will, in our opinion, constitute a major step in the attainment by the industry of a healthy postwar status. Hence, it is not our intention here either to indorse or to enunciate any new philosophy or long-range principles of rate making. Instead, it is our purpose to fix a service mail rate which will be high enough to provide reasonable security against the risks inherent in the dynamic and uncharted transitional period ahead and which at the same time will be low enough to provide a strong competitive incentive for economical and efficient management. It is our further intention to fix a service mail rate which over the transitional period will provide a fair and reasonable return on the used and useful investment although on the basis of reported results for selected short periods the rate may appear either unduly high or unduly low.

> In order that these objectives may be realized and that the mail rate may be kept at a level reasonably in accord with the dynamic operating conditions which will prevail during the present transitional period and provide an adequate margin of security against the uncertainties and risks which reasonably may be encountered, we conclude that a mail rate of 45 cents per mail ton-mile is required.
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> * * * * *
>
> As shown in appendix No. 2, the inclusion of mail revenue at 45 cents per ton-mile results in an estimated operating profit before income taxes of approximately $3,459,000 which, after 40 percent Federal income taxes, represents a return of 13.77 percent of the total investment required for the entire common carrier operations.

TWA did not ask the Board to reconsider its order; nor did TWA seek to have such order reviewed in Court pursuant to the provisions of the Act (Section 1006 (a), 49 U. S. C. 646 (a), *infra*, p. 107). The order became final on October 26, 1945. From that date until March 14, 1947, TWA performed required air carrier service and received presumably final payment therefor at the rate provided in that order. No action was taken by TWA, the Board, or the Postmaster General prior to March 14, 1947, to initiate a change in this rate.

On March 14, 1947, TWA filed a petition with the Board alleging that its mail rate had not been

fair and reasonable since January 1, 1946, and requesting the Board to fix a fair and reasonable rate "from and after January 1, 1946" (R. 8–13). Public Counsel of the Board moved to dismiss the petition insofar as it requested relief for the period from January 1, 1946, to March 14, 1947, when the petition was filed, on "policy" grounds (R. 13–21). After TWA filed an answer to their motion (R. 22–37), Public Counsel amended it to specify the Board's lack of "authority" to revise TWA's mail rate for the period prior to the institution of the proceeding as an additional ground (R. 38). Oral argument was heard on the motion (R. 39–60).

On December 2, 1947, the Board entered an order dismissing the petition "insofar as it requests the fixing of a mail rate for a period prior to March 14, 1947" (R. 91). The opinion of the Board stated that its action was based on its lack of power to grant the relief requested (R. 60–91). Member Lee dissented (R. 92–108).

On January 30, 1948, TWA applied for review of the Board's order to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals concluded that the Board has no power to revise mail rates retroactively to a period in which a final rate previously entered by the Board was in effect and unchallenged, and on August 2, 1948, affirmed the order of the Board (R. 111–115).

SUMMARY OF ARGUMENT

A.

Congress patterned the Civil Aeronautics Act upon its previous regulatory enactments in the transportation field, and sought, through that Act, to apply the usual public utility regulatory principles to the air-transport industry. Those provisions of the Act applicable to the determination of rates for the carriage of mail embody public utility rate-fixing concepts which preclude the retroactive superimposition of new rates on rates previously finally established, for which petitioner here contends.

The Congressional directive that the Board, in fixing mail rates, must seek to enable air carriers "under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense" (Section 406 (b)), does not convert the Board's primary function of fixing rates of compensation for the future into a duty to award amounts of compensation for the past. This is clearly shown by the legislative history of the Act's mail pay provisions. Moreover, such a directive is not unique to the Civil Aeronautics Act and is found, in substantially identical form, in other legislation governing the transportation industry which undoubtedly embodies, neverthe-

less, a typical rate-making pattern. Under well-settled principles, such legislation precludes rate revision for a period in which a final rate previously fixed was in effect and unchallenged by the initiation of a new-rate proceeding. While rates promulgated on principles of public-utility regulation must afford a genuine opportunity to earn a fair return, they do not guarantee that such a return will, in fact, be earned.

Acceptance of the petitioner's contention that the Board has the power retroactively to revise finally established rates would thwart the Congressional purpose to establish a rate-making method for determination of mail pay and would impede the accomplishment of the very objective the Act was designed to achieve, the encouragement and development of a self-sufficient air transport system. While the petitioner insists that it seeks to establish only the power of the Board in this respect and that that power need only rarely be exercised, its view of the statutory and constitutional requirements would, in fact, require the general adoption of a system of cost-plus auditing to reimburse carriers for past losses and recapture excessive profits earned in the past. Certainly, if the Board does have a revisory power, the most obvious determinant of the propriety of its exercise would be whether, at all times, the applicable rates were "fair and reasonable." The Board would thus necessarily be

required to determine the fairness and reasonableness of the return to the carrier during a past period rather than the fairness and reasonableness of a rate for the carrier in the future. The cost-plus awards which would follow would remove all incentive for managerial efficiency and the development of nonmail revenues, and destroy any hope of establishing a uniform rate for a group of carriers appropriately classified.

B.

In the light of the manifest purpose of Congress to establish a public utility rate-making pattern for the determination of compensation for carrying mail by air, it is questionable whether that pattern could be taken to have been nullified by language in a subsection of the Act far more clear than that upon which the petitioner relies. Certainly, Section 406 (a) (1) of the Act, which empowers the Board "to make such [fair and reasonable mail] rates [as it fixes] effective from such date as it shall determine to be proper" does not work that result.

Read in its context, this language only empowered the Board to make its mail rate orders effective from the date a proceeding was instituted to change a rate. The Act's directions to the Board to "fix" "rates", to take into consideration the service "to be rendered," and the need for compensation "to insure the per-

formance" of such service, all become meaningless if the "make effective" clause relied upon by the petitioner permits the Board to refix a rate for a past period during which the prior rate fixed by the Board was in effect and unchallenged.

The legislative history of the "make effective" clause puts its meaning beyond doubt. At the time of the principal legislative hearings in connection with the Civil Aeronautics Act, the members of the Interstate Commerce Commission were in disagreement as to whether the Air Mail Act of 1934, as amended, authorized them to make their mail rate orders under the Act effective from the date a proceeding was instituted. This division of opinion on the Commission was echoed by witnesses and legislators at the hearings. The resolution of the disagreement was important because the mail rate provisions of the bills being considered were substantially identical to those of the Air Mail Act of 1934, as amended, in this respect. The spokesman for the air transport industry expounded at length the thesis that the Commission was empowered to make its rate orders effective from the date a proceeding was initiated rather than being restricted to making them effective only from the date on which they were issued. To clarify the situation he offered the "make effective" clause as an amendment, explaining that it was to preserve the "present authority" of the Commission.

The amendment was adopted by both the Senate and House committees. From that time on, the "make effective" clause remained in all the principal bills considered down to the enactment of the Act. The subsequent legislative proceedings clearly indicate that Congress not only adopted the amendment of the air transport industry spokesman but also his explanation of his amendment. The "make effective" clause means no more, therefore, than that the Board may make its mail rate orders effective prospectively from the date on which a proceeding is commenced.

The petitioner is quite wrong in stating that the issue upon which the Commission had divided was put at rest by the Act's imposition of a compulsory duty to carry the mails. Under the Act the obligation to carry the mail is voluntarily assumed by the carrier and, but for the "make effective clause", the basis for disagreement with respect to the power to fix rates as of the date of the application for a change would remain. Section 406 (a) (1) had no purpose other than to resolve this issue.

C.

The specific issue presented by this case has been presented to the Board on eight occasions in the past. In none of these cases did the Board exercise power to revise final rates "retroactively." Saving the question of its statutory authority to exercise such power, it declined to act

as a matter of "sound general policy" because its orders had to have finality. However, in no case did it reexamine the past period, and its "policy" never admitted of any exception. Since the Board's "policy" had never admitted of any exception, it concluded in this case to state unequivocally that the basis for its rule of inaction was its lack of power. These decisions, far from establishing the petitioner's proposition that the Board has acted consistently with its view, establish a consistent course of administrative conduct and afford a substantial reason for finding that the Board is lacking in authority to revise mail rates "retroactively."

The Board decisions upon which the petitioner relies involved various factual situations wholly unlike that in the case at bar. No instance has been cited, because there is none, in which the Board fixed a new mail rate applicable to a period during which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding. The Board, from its inception, has been primarily concerned with fixing final rates for the future. It cannot reasonably be assumed that the Board would expend time, effort, and money to fix future rates if it construed the statute as requiring it to replace all such determinations with the results taken from audits after carrier experience ceases to be a matter for estimate and becomes a known fact.

There are, to be sure, situations in which a rate order is made effective as of a date prior to its issuance. The direction of the "make effective" clause, for example, requires the Board to fix fair and reasonable amounts of compensation for limited periods back to the institution of proceedings. But such retroactive orders do not eliminate the rate-making method as the primary determinant of mail pay because they do not destroy the finality of previous orders, cover only the limited period of time necessary to determine a new rate, and are normally accompanied by the determination of a rate for an indefinite period in the future.

None of the incongruities envisaged by the petitioner have resulted from, or will follow upon, the Board's refusal to reimpose new rates on previously fixed final rates. Sudden changes in conditions caused by groundings, or other "catastrophes" are properly taken into account in fixing rates; neither the Board nor other public-utility regulatory agencies treat such risks as operating risks but rather as capital risks. The Board generally fixes a rate of return commensurate with the risks of the industry, and it matters not at all that a carrier has a petition on file when disaster strikes. Other changes in conditions which affect the adequacy of the return do not happen overnight, and the right of a carrier to petition for an increase, when circumstances re-

quire, is sufficient protection. The petitioner's suggestion that the Board's view can be brought to naught by a carrier practice of keeping "protective petitions" on file at all times is negated by experience which reveals few such "protective petitions", possibly because such a device subjects the carrier to recapture of excessive profits. Moreover, there is considerable doubt as to whether a paper filed the day after a rate has been fixed constitutes a "petition" within the meaning of Section 406 (a) (1).

D.

The Board's construction of the Act gives rise to no constitutional difficulties. In *United States v. New York Central R. Co.*, 279 U. S. 73, upon which the petitioner relies, this Court assumed that the Constitution does not require that rates be refixed for periods during which they stand without protest by the carrier. Moreover, there is no compulsion on the airlines to carry the mails equivalent to that in the Railway Mail Pay Act, involved in the *New York Central* case and upon the basis of which the Court suggested that unless rates were made effective as of the date of application for increase, serious constitutional questions might be raised.

The true measure of the airlines' constitutional rights under the Civil Aeronautics Act is the protection afforded public utilities by the Fifth

and Fourteenth Amendments. Like air mail carriers, public utilities perform repetitive services at rates normally predetermined, and they are subject to the same type of compulsion to render service. This Court has repeatedly held that the Constitution does not guarantee the reimbursement of losses incurred by public utilities prior to an application for a rate increase.

ARGUMENT

THE BOARD CANNOT FIX A NEW MAIL RATE TO BE EFFECTIVE DURING A PERIOD IN WHICH A FINAL RATE PREVIOUSLY FIXED BY THE BOARD WAS IN EFFECT AND UNCHALLENGED BY THE INITIATION OF A MAIL-RATE PROCEEDING

Introduction.—In its narrowest compass, this case raises the question whether the Civil Aeronautics Board is empowered to fix a new mail rate for petitioner for the period from January 1, 1946, to March 14, 1947. An affirmative answer to this question, however, will necessarily mean that all mail rate orders of the Board are subject to retroactive revision by the Board at any time, either upwards or downwards. Such a complete destruction of the finality of the Board's mail rate orders would constitute so sweeping a reversal in the administration and functioning of the mail rate provisions of the Act as to render meaningless the work of the Board in this field for the past ten years. The broad implications of this seemingly narrow issue

require, therefore, that it be subjected to a searching scrutiny.

Petitioner's claim is that Section 406 (a) (1) of the Civil Aeronautics Act, in granting to the Civil Aeronautics Board the power to make "rates effective from such date as it shall determine to be proper," conferred the authority to make a new rate order effective as of a time prior to the filing of the airline's petition to change an existing rate (Br. 3). While the question involved may be thus simply stated, the issue tendered by the petition is basic in the administration of the Act.

The statement by the court below of the alternatives which were open to the Congress which enacted the Civil Aeronautics Act is enlightening. In the course of its opinion, the court said (R. 113–114):

> There are at least two, and perhaps more, different schemes or plans possible in a system of payment for service such as this. The first is where a price per unit is fixed. In such an arrangement, the fixing of the price is customarily in advance; the contractor makes or loses as his economic skill permits, and he bears the risks of the operation. This is the method ordinarily employed by authorities in regulating the charges of public utilities. The word ordinarily used is "rates." The second general type, or plan, is where a net result of the operation, or of a unit

> thereof, is contemplated and provided for. In such an arrangement, advance payments may be made to the contractor but the final figure cannot be determined until the operation, or the controlling unit thereof, is complete; the net to the contractor is the same no matter what the quality of the performance may be, and he bears none of the risks of the operation. The so-called "cost-plus" contracts fall with this classification.
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> We think that the scheme of the statute before us is of the former kind.

What petitioner really seeks from this Court is a declaration that Congress chose the latter alternative described by the court below, and that the Civil Aeronautics Act confers on the Board the power to superimpose, on rates validly and finally established, new rates which will compensate the airline for losses which it had suffered during the period preceding its application for a rate increase. Such a declaration would convert the Civil Aeronautics Act from an enactment establishing a system of future rate regulation into one which has set up machinery for the award of compensation for past services akin, as the court below stated, to that to which cost-plus contractors are entitled.

The difference between the petitioner and the Board is thus not with respect to the meaning of a narrow procedural provision; the issue is, rather, substantive and fundamental. The type

of regulatory system to which air lines carrying the mails are to be subjected depends upon this Court's answer to the question here presented.

Viewed in this perspective, the basic problem in this case and the materials upon the analysis of which depends its resolution, take on a wholly different color. It is the Board's view that the language of the Act and its legislative history deny the power which the petitioner seeks to attribute to the Board. It insists, moreover, that what might be wholly legitimate contrary readings of statutory language and quite rational contrary inferences from Congressional choice of phraseology were the question less basic, become entirely inadmissible when the question is properly appraised.[5]

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[5] This Court has so approached other cases. In *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 110, this Court held that an order of the Civil Aeronautics Board was not subject to judicial review notwithstanding the Court's statement that "it may be conceded that a literal reading of § 1006 [of the Civil Aeronautics Act] subjects this order to reexamination by the Courts. It also appears that the language was deliberately employed by Congress, although nothing indicates that Congress foresaw or intended the consequences ascribed to it by the decision of the Court below." Likewise in *United States* v. *New York Central R. Co.*, 279 U. S. 73, 79, this Court, in holding that the Interstate Commerce Commission had power to fix a railway mail rate back to the date of petition, stated that it was "quite aware that minutiae of expression may be found that show Congress to have been thinking of the future," and that "we put our decision not on any specific phrase, but on the reasonable implication of an authority to change the rates of pay which existed from the day the application was filed. * * *."

That being so, the meaning of Section 406 (a) (1) is to be gleaned not from a mere textual analysis of its language but from a proper understanding of the entire Act, its history and its purposes. In Point A, therefore, we shall show that Congress, when it enacted the Civil Aeronautics Act, contemplated a typical rate regulatory scheme, not a method for determining compensation for past services. We shall, in this part of our argument, also show that the petitioner's interpretation of Section 406 (a) (1) is flatly inconsistent with the statutory scheme and that, that being so, Section 406 (a) (1) cannot be read as accomplishing in one phrase in a subsection of a detailed and complicated legislative enactment what Congress studiously and purposefully avoided doing in the Act as a whole.

In that light, we proceed, in Point B, to analyze the language of Section 406 (a) (1) in its context and to examine its legislative history to show that it affords nothing like the clear mandate which would be necessary to upset what is plainly the Congressional purpose. We shall show, on the contrary, that the legislative history makes crystal clear that Congress did not intend to confer on the Board the power for which petitioner contends. That the Board's administrative practice fully supports the conclusion it reached in this case and produces no incongruous results will be demonstrated in Point C. And, finally, in Point

D, we shall show that the Board's view does not render the Act vulnerable to a charge of constitutional invalidity.

A. SECTION 406 OF THE CIVIL AERONAUTICS ACT ESTABLISHES A SYSTEM FOR THE REGULATION OF FUTURE RATES, NOT MACHINERY FOR THE AWARD OF COMPENSATION FOR THE PAST

1. *The origins and the language of the Act show that it establishes a public utility rate-making pattern.*—Consciously modeled after the Interstate Commerce Act (24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*), the Motor Carrier Act of 1935 (49 Stat. 543, 49 U. S. C. 301, *et seq.*) and the Air Mail Act of 1934 (48 Stat. 933),[6] the Civil Aeronautics Act of 1938 provides for comprehensive regulation of the economic and safety aspects of the air transport industry.[7] Testimony at the hearings on the bills which formed the basis for the Act was almost unanimous in requesting the establishment of a regulatory scheme that would afford relief and

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[6] For a summary of portions of the legislative history of the Act supporting this conclusion see Rhyne, *The Civil Aeronautics Act Annotated* (1939), p. xiii, note f: see also note 11, *infra*.

[7] The Act as originally enacted conferred certain functions on the Authority. The functions of the Authority in connection with, *inter alia*, rates for the transportation by air carriers of persons, property, and mail were transferred to the Civil Aeronautics Board by Reorganization Plan No. IV, which took effect June 30, 1940 (54 Stat. 1235; 5 F. R. 2421). Accordingly, the term "Board" should be substituted for "Authority" in all references thereto.

protection along the lines customarily accorded to public utilities. Thus, witnesses before the Congressional committees, making frequent references to legislative controls over railroad, motor carriers and even to electric utilities,[8] advocated the use of certificates of public convenience and necessity, the regulation of passenger and property rates to prevent cut-throat competition, the protection of routes, safety regulation, labor regulation, control of mergers, etc.[9] The President of the Air Transport Association, and acknowledged spokesman for the air transport industry, Edgar S. Gorrell, testified that:

> The bill before you is more or less the usual form of American regulation of

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[8] *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess., pp. 39, 46–48, 66, 76; *Hearings before Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760*, 75th Cong., 1st Sess., pp. 493, 310.

[9] *House Hearings*, note 8, *supra*, pp. 26–27, 39, 40, 46–47, 66, 67, 68–74, 167–214; *Senate Hearings*, note 8, *supra*, pp. 51–64, 310, 376–377, 467, 493. A more generalized view was expressed by a representative of the National Association of Railroad and Utilities Commissioners: "It is the view of our association that any important public-utility industry requires regulation in the public interest and will be regulated sooner or later, and that the full purpose of regulation can best be accomplished only by regulation from the beginning of the development of the industry" (*House Hearings*, note 8, *supra*, p. 163). This witness urged further that losses and wastes from open competition could be avoided: "* * * if the Congress shall at this time provide for the character of regulation which is now being given to other public utility enterprises." *Id.* at 164.

> utilities or transportation and embraces the points which are common to all such types of legislation.[10]

It is not surprising, therefore, that the provisions of the Act bear a striking similarity to the provisions of other Federal laws regulating different parts of the transportation industry[11] and public utility statutes generally.[12]

The petitioner concedes that the authority granted to the Board to "determine and pre-

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[10] *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9738*, 75th Cong., 3d Sess., p. 297.

[11] Commissioner Eastman testified (*Senate Hearings*, note 8, *supra*, p. 70): "Now, these two bills you have before you follow the usual pattern of regulatory bills. And you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to motor carriers." In the same vein, the President of the Air Transport Association, Edgar S. Gorrell, testified (*House Hearings*, note 8, *supra*, p. 264): "H. R. 5234 [an early form of the bill which became the Civil Aeronautics Act] is, in many instances, a Chinese copy of Parts I and II [of the Interstate Commerce Act]."

"In general the new Act followed the regulatory pattern of the Interstate Commerce Act, particularly Part II thereof, comprising the Motor Carrier Act of 1935. Many provisions were taken over substantially verbatim." Ballard, *Federal Regulation of Aviation* (1947) 60 Harv. L. Rev. 1235, 1257.

[12] See, for example *McKinney's Consolidated Laws for New York, Annotated*, Book 47 (Public Service Law), Section 49. Cf. Section 406 (a) and (b) of the Act relating to mail rates (*supra*, pp. 2–4) and Section 1002 (d) and (e) relating to rates for the carriage of persons and property. *Infra*, pp. 105–106.

scribe" "just and reasonable * * * rates" for the carriage of persons and property (Sections 404 (a) and 1002 (d)) is typical of a public utility rate-making authority and inconsistent with any power to make adjustments retroactively for unanticipated losses or unexpected excessive profits (Br. 35). It contends, however, that the Board's power with respect to establishing compensation for carrying mail is of quite a different sort. Although Section 406 (a) authorizes the Board to "fix and determine" "fair and reasonable rates" for the carriage of mail, the petitioner asserts that the standards for determining mail rates are so different from those for determining rates for the carriage of persons and property as to make inapposite rules for the fixing of typical public utility rates (Br. 37–46).

That assertion may be tested by a comparison of the standards made applicable by the Act for the fixing of rates for the carriage of persons and property and rates governing mail transportation:

Standards for Fixing Rates for the Carriage of Persons and Property (Section 1002 (e))	*Comparable Standards for Fixing Rates for the Carriage of Mail* (Section 406 (b)) [13]
"(1) The effect of such rates upon the movement of traffic;	(1) No comparable standard. (See note 18 *infra*, p. 28.)
"(2) The need in the public interest [14] of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;	(2) "The need of each such air carrier for compensation * * * sufficient * * * to enable [them] * * * to maintain and continuet he development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."
"(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;	"(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;" [15]
"(4) The inherent advantages of transportation by aircraft; and	(4) "The conditions peculiar to transportation by aircraft."
"(5) The need of each air carrier for revenue sufficient to enable such air carrier under honest, economical, and efficient management, to provide adequate and efficient air carrier service." [16]	(5) "The need of such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service."

[13] The full text of section 406 (b) is set forth *supra*, pp. 3–4.

[14] "Public interest" is defined, in Section 2 of the Act (49 U. S. C. 402), to include—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

[15] Section 406 (b) has an additional standard which is really included within the standard quoted in the text. The additional standard is:

(Footnote 15 continued on p. 27.)

[16] See p. 27.

This comparison reveals that, with but one possible exception which we shall now proceed to discuss, the Act embodies substantially the same rate-making method and the same rate-making standards for determining the compensation to be received by air carriers for carrying persons and property and for carrying mail.

2. *The developmental aspects of the Act are consistent with a public utility rate-making pattern.*—The rate-making standards applicable in fixing mail rates differ principally from those typically applied in that the last clause of Section 406 (b) provides that the mail rates fixed by the Board shall be high enough so that the revenue expected to be derived therefrom and from all other sources will permit an air carrier to meet its anticipated costs of operation under "honest, economical, and efficient management" and to earn a return calculated to enable it to "maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." [17]

"The condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail * * *."

[16] These provisions are substantially identical to the provisions of Section 216 (i) of the Motor Carrier Act of 1935 (49 Stat. 543, 558, 49 U. S. C. 316 (i)) applicable to common carriers by motor vehicle. Cf. Sharfman, *The Interstate Commerce Commission*, Pt. IV (1937), pp. 414–420.

[17] See note 3, *supra*, and the authorities cited therein.

This is the so-called "subsidy" provision of the Act.[18] As will appear, it does not change the rate-making method for determining mail pay.

The legislative history of the Act emphasizes what is plain from the language of the Act, and its origins, namely, that the mail pay provision was to be administered by a "rate" technique and that the needs of the commerce of the United States, the Postal Service, and the national defense were not to be met by direct subsidies but, rather, that these needs were additional elements to be considered in fixing "fair and reasonable rates" for the carriage of mail. Although the Federal Aviation Commission had recommended that mail rates should be compensatory for the service rendered and that subsidies should be

[18] The reason why the last clause of Section 406 (b) is sometimes called a "subsidy" provision is that it relates to the fixing of mail rates, rates which are only applicable to a single customer, the United States. Since it is no longer the policy of the United States to confine air-mail payments to air-mail revenues, as was true under Section 6 (e) of the Air Mail Act of 1934 (48 Stat. 933, 936), it is evident that the higher mail rates are fixed the higher will be the revenues of the carriers therefrom. With other types of traffic, rate increases may result in lower revenues caused by a decline in the volume of traffic which will be offered at the higher rates (*cf.* Section 1002 (e) (1) of the Act, *supra*, p. 26). It is the inapplicability of the usual economic limitation on a rate, namely, the ability of traffic to pay, which makes this standard particularly beneficial to carriers in the fixing of mail rates and results in the standard being called a "subsidy" provision. Notwithstanding the results obtained, mail compensation is determined through the rate-making process.

paid separately," the bills subsequently considered by Congress did not so provide. Thus, the president of the Air Transport Association, Edgar S. Gorrell, testified:

> There are only two ways whereby the necessary capital can be provided to this industry. One is the way toward which the governments of foreign lands increasingly tend—the way of mounting governmental subsidies, whereby public funds are poured without stint into air transport. The other way is the traditional American way, a way which invites the confidence of the investing public by providing a basic economic charter that promises the hope of stability and security, and orderly and intelligent growth under watchful government supervision.
>
> It is the second way, the traditional American way, which is here proposed.[20]

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[19] *Report of the Federal Aviation Commission*, Sen. Doc. No. 15 (74th Cong., 1st Sess.), pp. 49–51. The Commission's recommendation number (3) was stated as follows:

"The carriage of mail should be put on a commercial basis, with payments to lines within the amount received by the Post Office. Whatever additional sums are for the time being necessary to maintain and develop adequate transport services should be allocated specifically to that purpose by the government."

[20] *Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659* (75th Cong., 3d Sess.), p. 31; see also p. 21, and *House Hearings*, note 10, *supra*, p. 251, and pp. 75, 76, 121, 169, 337–8, 339, 465, 468 and *House Hearings*, note 8, *supra*, pp. 36, 79, 151, 243, 244, 308.

Early in the hearings, Commissioner Eastman pointed out the similarity between the problem of fixing mail compensation for air carriers and fixing railroad rates. He stated:

> Whether that [Sections 304 (c) and 310 (f) of H. R. 5234] is to be regarded as a subsidy or not, I am not sure. As a matter of fact, it is much like the situation with respect to the railroads. There the most important part of the service is the freight service * * * they have frequently argued to the Commission that it is impossible for them to get a fair return on the passenger business and therefore the freight must carry that load, if they are to get the fair return * * * the situation is much the same here * * * If it should be the situation that for competitive and other reasons the passenger part of the business cannot be made to pay its way, then it follows that the companies cannot operate successfully from a financial point of view unless they get enough from carrying the mail to cover the deficiency on passengers.[21]

This analogy to rate-making for the railroads, which was already embodied in the bills before Congress, was emphasized by the spokesman for the air-transport industry, Mr. Gorrell:

> Before leaving the subject of mail compensation, I want to refer briefly to the question of considerations involved in fixing compen-

[21] *House Hearings*, note 8, *supra*, p. 36.

sation. The fundamental consideration in fixing mail, passenger, express, and freight rates is, of course, that there should be a return to the carrier which will give it enough revenue to keep going under economic management. This consideration is operative with respect to every form of transportation and is, indeed, the task of the whole question of rate regulation of any public utility. In a sense, the problem of fixing rates for particular classes of traffic by a regulatory agency resolves itself into determining what share of the total return necessary to the carrier should be borne by each particular class of traffic.

As Commissioner Eastman pointed out to this committee, such a consideration has, in fact, been dealt with in the case of regulating certain freight rates for the railroads. Thus, in the last analysis, the problem is to determine what the carrier should ultimately receive from all sources and then to allocate the burden among the various classes of traffic, including the mail, as may be justified in the public interest.[22]

[22] *Senate Hearings*, note 8, *supra*, p. 438; see also p. 497. Similar statements were made by this witness to the House Committee: "The end in view is, of course, a reasonable return to the carrier, under economical management, so that it can continue in service. That return is to be secured as a whole from various classes of traffic, including mail. The division of the burden between these classes must depend upon many factors, including the ability of each class to pay, the relative importance of each class, the constancy of demand, the facilities that have to be devoted because of the

The brief and unequivocal reports of the Congressional committees handling the bills, which were enacted into law without material changes in this respect, make it abundantly clear that the Congress adopted this view and adhered to the customary concepts of public utility rate regulation.[23]

The statutory requirement that "the needs of the * * * commerce of the United States, of the Postal Service, and of the national defense" be taken into account is not unique to the Civil Aeronautics Act. A similar statement is found in the Motor Carrier Act of 1935 (49 Stat. 543) and identical language was inserted into the Interstate Commerce Act by the Transportation Act

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peculiar demands of each class, and so on." *House Hearings*, note 8, *supra*, p. 317. Again, "* * * the rate-making body should * * * take into consideration the need for producing total revenues that will give a fair return. That need is fundamental to rate-making, and consideration of it is particularly applicable to fixing rates for mail transportation where there is only a single customer and where the commodity transported, the mail, cannot be readily compared, in terms of dollar value or otherwise, with other traffic" (*Id.* at p. 339).

[23] The Senate Committee reported: "The recognized and accepted principles of the regulation of public utilities, as applied to other forms of transportation, have been incorporated in S. 3845" (S. Rep. No. 1661) (to accompany S. 3845), 75th Cong., 3rd Sess., p. 2). The House Committee reported: "[the Board] would have the power to * * * fix rates for the carriage of passengers, property, and mail * * *." (H. Rep. No. 2254) (to accompany H. R. 9738), 75th Cong., 3rd Sess., p. 3). See also H. Rep. No. 2635, Conference Report to accompany S. 3845), 75th Cong., 3rd Sess., pp. 71–72.

of 1940.[24] And yet no one has ever contended that this statement of the "national transportation policy" caused the Interstate Commerce Act to cease to be a rate regulatory statute in a typical sense.

3. *A public utility rate-making pattern such as is established by the Act provides for future rates which have the attribute of finality.*—The assumption of power by the Board to determine compensation for the transportation of mail by aircraft during a period in which a final rate previously fixed by the Board was in effect and

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[24] The Transportation Act of 1940, c. 722, Title I, § 1 (54 Stat. 899) amended the Interstate Commerce Act by inserting a new paragraph entitled "National Transportation Policy" before Part I of the Act. It reads as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; *all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*" [Italics supplied.]

unchallenged by the initiation of a mail-rate proceeding is wholly inconsistent with the well-developed rate-making pattern of the statute. It being plain that Congress, in the Civil Aeronautics Act, adopted the usual public utility method for the fixing of mail transportation rates, the petitioner's view as to the power of the Board must be measured against the principles which govern public utility rate regulation.

Under the usual public utility rate-making method, the rate-making authority does not fix the income of the utility but only the rate it is to receive in the future for the sale of services, such rate being calculated to produce gross income for the utility sufficient to meet such necessary and allowable expenditures as are anticipated and a return which will satisfy statutory standards and be non-confiscatory in the constitutional sense. Such rates deal with the future and are not normally concerned with reimbursement of past losses. They are not subject to revision with respect to completed transactions but are final. Such rates afford an opportunity to earn a fair return but do not guarantee that such a return will, in fact, be earned.

If the rate-making authority "sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future." *Arizona Grocery* v. *Atchison Ry.*, 284

U. S. 370, 387. Thus, this Court has refused to require the capitalization of past losses in the rate base for the purpose of fixing future rates,[25] or the current reimbursement out of new rates of deficiencies arising from a failure to earn a reasonable return in past years,[26] or the capitalization of costs of maintaining excess capacity during the early period of operation.[27] Through Chief Justice Stone, this Court has stated:

> * * * But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding

[25] *Galveston Electric Company* v. *City of Galveston, et al.*, 258 U. S. 388.

[26] *Georgia Railway and Power Company, et al.* v. *Railroad Commission*, 262 U. S. 625, affirming 278 Fed. 242 (N. D. Ga.) where the district court stated at p. 247: "The claim that the failure to earn a reasonable return, if established, should now be either allowed as capital investment or amortized under this or future rates we cannot allow. * * * A rate established as reasonable, whether by the company or by the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business. We do not deny that it is within the discretion of the commission to consider the experience of the immediate past in fixing a just rate for the future, but we hold that no legal right exists to have disappointments or surprises in results balanced."

[27] *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, 315 U. S. 575.

> them to the rate base * * *. The deficiency may not thus be added to the rate base, for the obvious reason that the hazard that property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business.[28]

These rules are applicable equally to mail, passenger and property rates under the Act. This "rate" pattern was well established for public utilities, particularly in the transportation industry, when the Act was passed; it is a pattern that was fully elucidated before the Congressional committees considering regulation of the air-transport industry; it is a pattern that was plainly specified in the Act; and it is a pattern that has been consistently followed by the Board in its administration of the mail-rate provisions of the Act.

Petitioner's arguments in support of the proposition that "the Court of Appeals relied on a false analogy to public utility rate statutes" (Br. 27–44) are totally irrelevant to the issue. The Court of Appeals (R. 114), like the Board (R. 67–70), reasoned (1) that Section 406 was intentionally cast in the form of a "usual public

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[28] *Id.* at p. 590. Conversely, it is well established that a regulated utility cannot be required to give up excess earnings from past operations. *Board of Public Utility Commissioners, et al.* v. *New York Telephone Company*, 271 U. S. 23, 31–32; *Newton* v. *Consolidated Gas Company of New Jersey*, 258 U. S. 165.

utility rate-determination measure"; (2) that rates under such measures were primarily future rates and were final; and (3) therefore, the rates determined under Section 406 were of such character. In reaching its conclusion, the Court of Appeals did not assert the view that carrying mails is a "pubic utility function" (Br. 29–30), or that it was impractical to adjust mail rates "retroactively" as was true in the case of other public utility rates (Br. 33–37). At most, petitioner's arguments are reasons which might have been presented to Congress as to why Congress might have legislated differently than it did. They furnish no basis, however, for construing the Act.

Likewise, it is of little significance that Congress has the power to increase mail rates "retroactively" (Br. 13–16). That may be conceded (R. 86). The question is not what Congress might have done but what it did. Of this the Act and its legislative history leave no doubt; Congress established a public utility rate-making pattern for the determination of compensation for carrying mail by air. Indeed, the failure of Congress to provide for retroactivity in the Act in the same clear terms that it did in the statutes cited by TWA (Br. 13–16), and others (note 34, *infra*), is convincing evidence that it had no intention of doing so.

4. *Acceptance of petitioner's contention would thwart the congressional purpose.*—The facts of

this very case serve to highlight the dichotomy between the public utility regulatory pattern discerned by the Board and the court below in the Act and the petitioner's view of the mail rate provisions as authorizing compensation awards. In the course of the proceeding which TWA now seeks to nullify, the Board, as stated above, p. 5, prepared and introduced into the record of the proceeding indices of selected operating statistics for the future, and estimates of operating results and investment requirements for the future. On the basis of such materials and with a (6 C. A. B. 601–602)

> purpose to fix a service mail rate which will be high enough to provide reasonable security against the risks inherent in the dynamic and uncharted transitional period ahead and which at the same time will be low enough to provide a strong competitive incentive for economical and efficient management,

the Board concluded "that a mail rate of 45 cents per ton-mile is required." *Ibid.* Although its decision applies in part to a past period,[29] nothing could be plainer than that the Board was primarily concerned with the future effect of its order, which it considered to be final and

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[29] The Board's order, issued on October 26, 1945, was made effective as of January 1, 1945, the date a show cause order was issued proposing to reduce TWA's rate from 60 to 32 cents. This was in accordance with the Board's usual practice. See *infra*, p. 83.

binding. This is put beyond doubt by the Board's estimate, that on the basis of the mail rates it fixed, TWA would secure a return of 13.77 per cent, after taxes, on the total investment required for its entire domestic common carrier operations. Such a high rate of return is wholly inconsistent with the lack of risk involved in the petitioner's view that the Board is required to guarantee fair and reasonable amounts of mail compensation by the device of "retroactive" rate orders. And yet, the petitioner accepted the rates according it this return and, more significantly, the theory of regulation which those rates embodied. It cannot now urge, consistently, that the ground should once again be retraced and a compensation *award* be substituted for the rates designed, without objection by TWA, to provide reasonable security and yet assure "strong competitive incentive for economical and efficient management."

a. *The rate-making pattern would be destroyed.*—If the petitioner's view of the Board's power were accepted, the rate-making method for the determination of mail pay prescribed by the Act would be completely eliminated and a cost-plus auditing system substituted. Petitioner urges that the "make effective" clause in Section 406 (a) (1) permits the Board to make a new "rate" effective during a past period in which a previously determined rate was in effect and unchallenged by the initiation of a rate proceeding

(Br. 11–24). If this were true, the Board would not merely be permitted, but would be required, to take such action. While Section 406 (a) (1) merely requires the Board to make the fair and reasonable rate it fixes effective from such date as it "determines to be proper," if that provision is to be read as the petitioner reads it, the most obvious determinant of the propriety of the effective date of an order is whether or not the "rate" was "fair and reasonable" from such date (Br. 28–29). The Board, then, would necessarily be determining the fairness and reasonableness of the return to the carrier during a *past period* rather than the fairness and reasonableness of a *rate* for a carrier in the *future*. While the petitioner repeatedly insists that its contentions go only to the power of the Board and not its exercise (Br. 3, 10, 17, 74), its assertion that both the statute (Br. 40, 77, 81, 83) and the Constitution require (Br. 11, 80) that the airline be assured of a fair and reasonable *amount* of mail compensation at all times demonstrates that what the petitioner really seeks is a declaration that the Board must, in all cases, audit a carrier's books for a past period and award mail compensation sufficient to cover proper costs and a reasonable rate of return instead of fixing fair and reasonable rates for the carriage of mail for the future. So to hold would completely destroy the finality

of the Board's forward-looking rate orders and make all such orders merely tentative.[30]

b. *Achievement of the objectives of the Act would be impaired.*—This system of cost plus auditing to determine mail compensation would, if recognized, impede the accomplishment of the very objective the Act is designed to achieve, namely, the encouragement and development of a self-sufficient air transport system.[31]

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[30] The court below also made reference to the presumption against retroactivity. (R. 112, 113.) TWA's brief urges that this presumption is applicable only where a statute is applied to a period prior to its enactment (Br. 25–27). TWA's argument misses the court's point. Obviously the court was not laboring under the misapprehension that this Act applied to events prior to its enactment. The court was simply drawing an analogy between the uncertainty created by such a statute and the uncertainty created by TWA's interpretation of this statute. The hostility of the law to retroactivity is merely a judicial recognition of the desirability of finality and certainty. Cf. *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 389.

[31] See Sections 2 and 406 (b) of the Act. (*Infra*, pp. 100–101, and *supra*, pp. 3–4.) In the *First Annual Report of the Civil Aeronautics Authority* [Board] (1939), p. 21, it was stated:

"This administration of the act necessarily involves a policy of rate determination which serves to recognize managerial efficiency and to permit benefit therefrom to redound to the carriers, thus providing an incentive to management for further development while at the same time discouraging inefficient management by refusing, in fixing air-mail rates, to allow any of the costs incident thereto. Accordingly, the Authority [Board] has analyzed both past and forecast operating revenues and expenses of the air carrier in each proceeding in the light of the statutory test of 'honest, economical, and efficient management,' not for the purpose

First, if the Board were required to use a system of cost-plus auditing to reimburse carriers for past losses then, under the same system, it would have to recapture excessive profits earned in the past. As a result, carriers could never be certain that they could keep earnings from the carriage of mail. This would have two deleterious effects on the achievement of the objectives of the Act. It would remove all incentive toward managerial efficiency and the development of nonmail revenues since, as profits arose therefrom, mail payments would tend to become excessive and subject to recapture. Further, the possibility of recapture of excessive profits for carrying mail in past years would write a question mark across the financial statements of carriers and seriously impair their ability to raise private capital for expansion, new equipment and other needs essential to the development of a self-sufficient air transport system. This is one of the principal reasons why the court below concluded that the Board had no power to revise rates retroactively in this case (R. 114–115).

TWA suggests, however, that there is "nothing to fear" in recapture. Assuming, it states, that

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of invading proper managerial discretion but with the object of encouraging a progressive, efficient management which will be characterized by a constant effort to increase commercial revenues, thereby resulting in the attainment of an increasing measure of commercial self-sufficiency."

an airline "earns an unconscionably high profit from its mail pay" and "that the airline has made no disbursements and undertaken no commitments on the faith of that profit", why shouldn't the Board recapture? (Br. 77–80). While this hypothetical situation may be an intriguing possibility, it hardly squares with business reality. What business would earn very high profits and undertake "no commitments" of its funds? Common business practice is to commit such profits to the enterprise or declare a dividend. If the Board could only recapture when an airline had never "changed its position", it could in fact never recapture at all. The mail pay provisions would be administered not with "even-handed justice" but with open-handed injustice. It is far more likely that the Board would be required to recapture irrespective of the commitments made by carriers. The effect of such recapture would be industry-wide disruption. Whether or not the Board finally recaptures excess earnings in a given case, there will always be uncertainty as to what its action may be. So far as the effectuation of the policies of the Act is concerned, the vice of the situation lies in the existence of the power as much as in its exercise, for its mere existence gives rise to uncertainty.

Second, if petitioner's view were to prevail, one of the basic techniques for assuring efficient operation, namely, the fixing of uniform rates for

carriers with similar operating characteristics,[32] would lose much of its effectiveness as a means of furthering the policy of the Act to develop a sound air transport system through competition.[33] Section 406 (b) authorizes the Board to fix rates for "classes of carriers." The uniform rate is an important regulatory device to force carriers within a given class to compete in the development of revenue and control of costs. If the basic operating characteristics of the carriers are similar, a uniform rate for a class of carriers can have an important effect in stimulating good competitive performance. Under the cost-plus system of auditing which TWA reads into the Act, a carrier could always seek relief from the uniform rate and would, therefore, have no incentive to live within it.

If the interpretation of the Civil Aeronautics Act urged by TWA is correct, Congress gave the Board a blank check and authorized it to guarantee the airline industry for an unlimited time against all losses assuming only that there was economical management. A guarantee of an entire industry against loss could rest only upon the most specific language from which that intention

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[32] For examples of the use of this technique, see the cases cited in notes 1 and 2 of the Board's opinion in this case, fixing uniform service rates for the "Big Four" carriers and the "Little Six" carriers (R. 64).

[33] Section 2 (d) of the Act (Appendix, *infra*, p. 101).

would be clear beyond the shadow of a doubt. There is no such language in the Act. So radical and unprecedented a departure would certainly have been the occasion of considerable discussion among legislators. There is no such discussion in the legislative history. The clarity with which Congress, in other situations, has granted much more limited power to "recapture" excessive earnings or retroactively increase "rates" when that has been its intention,[34] leads to the conclusion that "retroactive" power to determine mail compensation and the power to "recapture" excessive earnings, both of which powers TWA asserts are possesed by the Board, should not be thrust upon the Board without a clearer sanction from the Congress. What Congress did clearly provide was a typical public utility regulatory plan whereby air carriers were entitled to receive final future mail rates which offered a genuine opportunity to earn profits from air carrier operations as a whole.

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[34] Transportation Act of 1920 (Act of February 28, 1920, c. 91), 41 Stat. 456, Tit. IV, § 422, 41 Stat. 488–491; Merchant Marine Act of 1936 (Act of June 29, 1936), c. 858, 49 Stat. 1985, Tit. V, § 505 (b) (49 Stat. 1998), Tit. VI, § 603 (c) (49 Stat. 2002); Renegotiation Act (Act of April 28, 1942, c. 247, Tit. IV, § 403 (56 Stat. 245), as amended, 50 U. S. C. App. 1191; see also the examples cited by TWA (Br. 13–16).

B. SECTION 406 (A) (1) WAS INTENDED ONLY TO EMPOWER THE BOARD TO MAKE RATE ORDERS EFFECTIVE AS OF THE INSTITUTION OF THE RATE PROCEEDING

We have already shown that the Act establishes a public utility rate-making pattern for the determination of compensation for carrying mail by air, and that, under this plan, mail pay is determined primarily by fixing *rates* of compensation for *future* services. TWA attempts to pervert this pattern into a cost-plus scheme of pricing whereby a carrier's books will be post audited and it will be awarded fair and reasonable *amounts* of compensation for services rendered in the *past*. It seeks to achieve this result solely by reference to the "make effective" clause of Section 406 (a) (1) of the Act, which empowers the Board "to make such [fair and reasonable mail] rates [as it fixes] effective from such date as it shall determine to be proper." (Br. 9, 16). It is questionable whether the burden of nullifying the pattern of the Act could be sustained on the basis of the "make effective" clause alone even if it could more readily be construed to mean, as TWA contends, that the Board can make its mail rate orders effective at any time. In any event, when the clause is read in the context of Section 406, and particularly in the light of its legislative history, it is clear that its purpose and meaning was neither to "empower" nor "direct" the Board to make its mail rate orders effective "ret-

roactively," thus destroying the carefully nurtured pattern of the Act, but simply to make its mail rate orders effective from the date a proceeding was instituted to change a rate, a procedure wholly consonant with the pattern of the Act.

1. *The language of Section 406.*—Many of the words and phrases used in Section 406 point to the necessity for interpreting the Act as the Board and the Court of Appeals did. The directions of Section 406 (a) (1) to "fix" "fair and reasonable *rates*" for carrying mail, "the facilities used and useful therefor, and the services connected therewith"; (2) "to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates"; (3) to fix rates upon "petition of * * * an air carrier"; (4) to do so only "after notice and hearing"; and (5) to determine rates upon the basis of the standards specified, are cast in the form, and use the language, of traditional public utility regulatory measures. Fair and reasonable rates fixed by such measures, as the Court of Appeals found (R. 114), and TWA concedes (Br. 35), "look to the future." Effect may be given to the foregoing language of Section 406, therefore, only if the concept of future rates is preserved through the interpretation adopted by the Board and the Court of Appeals. TWA attempts to reconcile

the use of the word "rates" in Section 406 with its interpretation of the "make effective" clause by arguing that "rates" is "traditional mail pay language" (Br. 28–33). However, this argument ignores the accompanying language in Section 406, which is public utility rate-making language, and the clear intention of Congress to establish a typical public utility regulatory measure.

That the word "rates" as used in Section 406 (a) and (b), and even in the "make effective" clause itself, refers to a measure of payment for future operations is borne out by some of the language of Section 406 (b), which in itself limits, or else conflicts with, the asserted plain meaning of the "make effective" clause. Thus, Section 406 (b) requires the Board, in fixing rates under Section 406 (a), to take into consideration among other factors "such standards reflecting the character and quality of service *to be rendered* by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to *insure the performance* of such service." [Italics supplied.] The portions of the above quotation which we have emphasized demonstrate that the rates the Board is to fix are to apply to future operations. Moreover, if these words are to be given content they must limit or else conflict with the asserted meaning of the "make effective" clause, for what is to

happen in the future is hardly a proper consideration for determining the extent of payment for past services.

The basic directive to the Board in Section 406 (a) is to "fix and determine from time to time * * * fair and reasonable rates." The well understood meaning of "fix" is "to settle," "make permanent," "make certain." But if, as the petitioner urges, the "make effective" clause were construed to grant the Board authority to refix a rate for a period for which a prior rate fixed by the Board was in effect without challenge, the Board would in fact never "fix" a rate but would only make tentative determinations. It is impossible to consider a rate as fixed if at any time thereafter it can be revised. It is clear, therefore, that "fix" cannot be given its normal meaning if the "make effective" clause is given the construction which TWA asserts is plain.

The use of the word "such" in the "make effective" clause is also significant. It establishes that the clause is not to confer any new or independent substantive authority to fix and de-

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* * * its [fix] ordinary meaning is to make permanent something that is unsettled.'" *Kendall* v. *Stafford*, 178 N. C. 461, 466 (1919); "To make firm, stable, or fast; * * * to set or place definitely; to establish; station; settle; * * * to asign precisely * * *." Webster's *New International Dictionary* (2d ed., 1938), p. 958.

termine mail rates, but only to deal with "such rates" as have been fixed; and even then, only to deal with "such rates" in one of their procedural aspects. To construe the clause so as to require the Board to insure a carrier a fair and reasonable amount of compensation at all times, as TWA does, nullifies the word "such" and creates a wholly new concept of compensation without statutory justification.

It was on the basis of considerations like these that the court below concluded that: "The language of the disputed clause is not necessarily retroactive. It is as apt in reference to the future as it is to the past" (R. 113), and "We think that anyone reading the whole of the statutory provisions relative to these rates [Section 406] must conclude that they specify the fixing of a rate, or rates, for the carrying of a physical unit of mail, and that they contemplate future operation" (R. 114).

While a keyhole view of Section 406, including the "make effective" clause, limited to the dictionary meanings of the words employed would sustain the conclusion of the Board and the Court of Appeals, it might leave uncertainty as to whether effect were being given to the intentions of Congress. Any such uncertainty, however, is completely dispelled by the legislative history of the "make effective" clause to which we now turn.

2. *The legislative history.*—After considering the materials set forth below, the Court of Appeals concluded "that the addition to the original bills of the 'make effective' clause appears to have been designed to establish in the Board the same powers which had theretofore existed at (sic) the Interstate Commerce Commission in respect to railway mail. And it had been established that the Interstate Commerce Commission could make its orders effective as of the date of the beginning of the proceedings; but it had never been claimed that the Interstate Commerce Commission had unfettered retroactive power" (R. 113). These conclusions are amply supported.

In none of the 18 mail-rate cases decided by the Interstate Commerce Commission under the Railway Mail Pay Act[36] prior to the passage of the Civil Aeronautics Act did the Commission refix a rate to be effective during a period prior to the initiation of a rate proceeding (R. 71); in most of them, however, the Commission made its order effective as of the date the proceeding was initiated.[37] Most significantly, in *Railway*

[36] Act of July 28, 1916, Sec. 5, c. 261, 39 Stat. 412, 429, 39 U. S. C. 542. This provision is substantially the same as Section 406 (a) (1) of the Civil Aeronautics Act of 1938, except that the last clause differs from the "make effective" clause of Section 406 (a) (1).

[37] See, for example, *Railway Mail Pay*, 216 I. C. C. 467 (1936); *Railway Mail Pay*, 185 I. C. C. 715, 720 (1932); *Railway Mail Pay*, 151 I. C. C. 734 (1929).

Mail Pay, 144 I. C. C. 675 (1928), the Commission refused to make higher rates for some carriers effective prior to the date they were brought into the proceeding although it found that their rates had become less than fair and reasonable before that date. In one of these railway mail pay cases, the Postmaster General questioned the right of the Commission to make its order effective as of the date the rate proceeding was initiated rather than upon the issuance of the order. The resulting litigation culminated in the decision in *United States* v. *New York Central R. Co.*, 279 U. S. 73. This Court there held that the Commission could make its mail-rate orders effective from the date proceedings were initiated. It stated (279 U. S. at 78–79):

> We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. * * * But the filing of an application expresses a present dissatisfaction and a demand for more. * * * If the claim of the railroads is just they should be paid from the moment when the application is filed. * * * the necessary investigation takes a long time, in these cases years; but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future. * * * We put our decision not on any specific phrase, but on the reasonable implication of an

> authority to change the rates of pay which existed from the day the application was filed; the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission, and the fact that, unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air.

The Air Mail Act of 1934 both initially [38] and after amendment by the Act of August 14, 1935,[39] contained a provision for the determination by the Interstate Commerce Commission of rates for the carriage of mail by air substantially the same as that in the Railway Mail Pay Act of 1916.[40] In none of the 26 cases decided by the Interstate Commerce Commission under these statutes did the Commission refix a rate to be effective during a period prior to the date of initiation of the proceeding (R. 71); in most of them, however, the Commission made its order effective as of the date of the initiation of the proceeding.[40a] While the result in these cases was the same as that reached under the Railway Mail Pay Act, there was a sharp divergence of views

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[38] 48 Stat. 933, 935.

[39] 49 Stat. 614, 616.

[40] These provisions are also substantially the same as Section 406 (a) of the Civil Aeronautics Act except for the last clause, which differs from the "make effective" clause of the latter enactment.

[40a] TWA agrees with these conclusions (Br. 56–57) except that it points to one case (Br. 58, note 72) which it interprets

within the Interstate Commerce Commission as to its correctness. In *Air Mail Compensation*, decided June 6, 1936, by Division 3,[41] it was held, in substantial reliance upon the *New York Central* case, that the Commission had authority to make its mail rate orders effective prior to the decision date and back to the date of commencement of proceedings. Chairman Mahaffie dissented on this issue on the ground that the *New York Central* case was based on eminent domain and constitutional requirements and was not a governing authority under the Air Mail Act of 1934.[41a]

On appeal to the full Commission, the decision of Division 3 was sustained.[42] Commissioners Lee and Mahaffie dissented, and Commissioners Splawn and Caskie concurred in a separate opinion; those who concurred separately pointed out that the *New York Central* case was not necessarily a governing precedent for the Commis-

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as having increased mail pay "retroactively." This case is discussed, *infra*, note 62, p. 68.

Some of the cases supporting these conclusions are cited by TWA (Br. 57, notes 70–71). TWA also refers (Br. 58, note 72) to two cases described in *American Airlines, Mail Rates*, 3 C. A. B. 323, 327 note 12, in which mail-rate decreases were adjusted retroactively to March 1, 1935. This action was taken by the Postmaster General and not the Commission and was apparently based on Section 6 (c) of the Air Mail Act of 1934, as amended (Pet. Br., App. B, pp. B10–B11), which specifically provided for retroactivity to March 1, 1935.

[41] 216 I. C. C. 166.

[41a] *Id.* at 191.

[42] *Air Mail Compensation*, 222 I. C. C. 602 (1937).

sion's action. Commissioner Mahaffie continued to dissent on this point, even after enactment of the Civil Aeronautics Act of 1938 (R. 75).[43] Thus, prior to, during, and after the hearings on S. 2 and H. R. 5234 during the Spring of 1937, the bills in which the Civil Aeronautics Act found its genesis (see *infra*, pp. 58–60) the effect of the language of the Air Mail Acts of 1934 and 1935 with regard to the power of the Commission to make its mail rate orders effective from the date of a petition was in dispute.

The disagreement in the Commission appeared soon after in the legislative arena. During the hearings on S. 2 (Substitute), Senator McKellar attacked, and Senator McCarran defended, the Commission for fixing mail rates back to the date a petition was filed.[44] Since the mail rate provisions of the bills on which hearings were being held were practically identical with those in the Railway Mail Pay Act and the Air Mail Acts of 1934 and 1935, the disagreement in the Commission and among witnesses and legislators was bound to be perpetuated by the bills.

After much inconclusive testimony at the hearings, Colonel Gorrell, the president and spokesman for the Air Transport Association, gave a detailed explanation of the *New York Central*

[43] Seven additional dissenting opinions by Commissioner Mahaffie are cited by TWA (Br. 57, note 70). In all of them, he simply referred to his dissent in *Air Mail Compensation*, 216 I. C. C. 166, 191.

[44] *Senate Hearings*, note 8, *supra*, 179, 180, 239, 291, 343.

case and his views on "Retroactive Dates re Mail Compensation." [45] Among other things, he stated:

> On a number of occasions mention has been made before this committee as to the power of the Interstate Commerce Commission to make a retroactive award.
>
> * * * * * *
>
> In the first place, the character of the so-called retroactive order involved should be clearly understood. Senator McKellar refers to the same as "back pay." This seems to me a mistaken description.
>
> * * * All the Commission did that was in any sense retroactive was to make its final order [216 I. C. C. 166] effective as of the date of the filing of the petition * * *. The order did not grant any "back pay" but simply changed the rates in accordance with its decision on the petition filed June 27, 1935.
>
> * * * * * *
>
> * * * unless the Commission could make its order effective as of the date its attention was called to the insufficiency of the rates, the carrier would have had to carry mail for an insufficient rate and possibly might have had to litigate its claim in the Court of Claims.
>
> * * * * * *
>
> * * * there is no substantial doubt but that the Commission is empowered to put

[45] *Id.* at pp. 483–485.

> a rate order in effect as of the date when the Commisison has been formally advised an unjust rate then and there existed."[46]

The important point to note from Colonel Gorrell's testimony is that, just as was true within the Interstate Commerce Commission, the only disagreement which he attempted to resolve involved the question whether the Commission was empowered to make air mail rate orders effective as of the date the rate proceedings were initiated or whether it was restricted to making such orders effective upon their issuance.

In order to prevent the disagreement in the Commission and at the hearings from persisting if the pending bills were enacted into law, Colonel Gorrell, on the same day, offered the following amendment:

> On page 31 of the substitute change the semicolon in line 11 to a comma and insert thereafter the following: "and to make such rates effective from such date as it shall determine to be proper * * *"
>
> Explanation of the foregoing amendment is submitted to accompany the amendment proposed to pages 46 and 47, *infra*.[47]

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[46] Colonel Gorrell gave substantially identical testimony before the House Committee on Interstate and Foreign Commerce on April 8, 1937. *House Hearings*, note 8, *supra*, pp. 325–7.

[47] *Senate Hearings*, note 8, *supra*, p. 523.

The full explanation that he gave follows:

> The foregoing amendment[48] and that proposed at page 31, line 11, are necessary in order to carry forward under the new legislative jurisdiction any unfinished proceedings begun under acts repealed by this bill and continues, any undecided proceedings in court. Evidence and arguments submitted prior to the enactment of the bill are preserved for appropriate future use, and *the present authority of the Commission to fix appropriately the effective date of its rate decisions is likewise specifically preserved.*[49] [Italics supplied.]

Colonel Gorrell proposed the same amendments to the House Bill (H. R. 5234) and made exactly the same comment to the House Committee.[50] Both the Senate and House Committees accepted Colonel Gorrell's amendment and incorporated the "make effective" clause into the bills which they reported out.[51]

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[48] The amendment proposed to pages 46 and 47 provided that all orders, reports and regulations made by the Commission under the prior law would remain in effect until modified by the Commission.

[49] *Senate Hearings*, note 8, *supra*, p. 525.

[50] *House Hearings*, note 8, *supra*, p. 408.

[51] H. R. 5234 was reintroduced as H. R. 7273 (81 Cong. Rec. (May 27, 1937) 5095–6) and reported to the House (H. Rep. No. 911, 75th Cong., 1st Sess.). S. 2 was reported to the Senate on June 7, 1937 (Sen. Rep. No. 686, 75th Cong., 1st Sess.) and debated on August 13, 14, 16, and 18, 1937 (81 Cong. Rec. 8839, 8882, 8957, 8968, 9202, 9204, 9220, 9226).

The Report of the House Committee and the remarks of the Senate floor leader in debate make it abundantly clear that the testimony and explanations of the proponent of the "make effective" clause amendment were also accepted by the Committees, for they emphasize the thesis of Colonel Gorrell that, under the bill, rates for air mail were to be treated just as the Interstate Commerce Commission had treated air mail rates and railway mail rates in the past. Thus, the House Report stated:

> Rates for the carriage of air mail would be fixed by the Commission in the same manner as the Commission now fixes the air-mail rates for all domestic air-mail carriers.[52] [i. e., under the Air Mail Act of 1935.]

Senator Truman, who was in charge of the bill in the Senate, described it as follows:

> It follows exactly sections 1 and 2 of the Interstate Commerce Act so far as that can be applied to air transportation. * * * That part of the bill which refers to air mail treats air mail just as mail on railroads is treated.[53]
>
> * * * this bill is simply a regulatory measure which does for the air carriers exactly what is done for railroads and for busses and trucks. I cannot too strongly emphasize that fact.[54]

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[52] H. Rep. No. 911, 75th Cong., 1st Sess., p. 18.

[53] 81 Cong. Rec. 9202.

[54] 81 Cong. Rec. 9204.

At the hearings on the 1938 bills (S. 3845, S. 3659 and H. R. 9738),[55] which had mail rate provisions substantially identical to those in the 1937 bills (S. 2 and H. R. 7273), Colonel Gorrell did not testify further on the "make effective" clause.

At the suggestion of the Committee Chairman (at both House and Senate hearings), he did not repeat those details covered in his testimony on the earlier bills, stating to the House Committee: "With your permission we will not cover any of the details which we covered last year."; [56] and to the Senate Committee: "With your permission, I shall cover nothing that would be repetitious of last year's testimony but shall adhere solely to the essential points now before you." [57] This testimony was given before the House Committee on March 30, 1938 and before the Senate Committee on April 6, 1938. The three bills being considered at these hearings became the Civil Aeronautics Act of 1938. There was no further mention made of the "make effective" clause prior to the enactment of the Act. Accordingly, the legislative history of S. 2 and H. R. 5234 is the most important source of information as to Congressional intent with respect to the "make effective" clause in Section 406 (a) of the Act.

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[55] The three bills were fundamentally the same. 83 Cong. Rec. 6725.

[56] *House Hearings*, note 10, *supra*, p. 297.

[57] *Senate Hearings*, note 20, *supra*, p. 21.

The "make effective" clause was thus inserted in the bills which eventuated in the Act in order to resolve a disagreement among the members of the Interstate Commerce Commission and among witnesses and legislators at the hearings on the bills as to whether the Interstate Commerce Commission had authority to make its mail rate orders under the Air Mail Acts of 1934 and 1935 effective as of the date a mail rate proceeding was initiated or whether it was limited to making such orders effective from their issuance. The resolution of these disagreements was essential to the legislation being considered because that legislation was in the same form as the Air Mail Acts of 1934 and 1935, and if left unchanged, would be subject to the same disagreements, with resulting uncertainty. The witness who offered the amendment inserting the "make effective" clause in the pending bills explained that thereby "the present authority of the Commission to fix appropriately the effective date of its rate decisions is * * * specifically preserved." The same witness had just previously testified that "there is no substantial doubt but that the Commission is empowered to put a rate order in effect as of the date when the Commission has been formally advised that an unjust rate then and there existed." Clearly the person who offered the "make effective" clause amendment and explained it expressed an intention to grant the Commission authority to make its mail

rate orders effective as of the date a mail rate proceeding was initiated, and nothing more; and he is the only person who ever explained or even commented on the "make effective" clause during the extensive legislative consideration of the Act. Thereafter, both the Senate and House Committees accepted the amendment and incorporated it into the bills which they reported to their respective Houses. The Report of the House Committee and the remarks of the Senate floor leader in debate make it abundantly clear that the testimony and explanations of the proponent of the "make effective" clause were also accepted by the Committees, for they emphasize the thesis of Colonel Gorrell that under the bills the rates for air mail are treated just as the Interstate Commerce treated air mail rates and railway mail rates in the past. As noted earlier, the almost invariable practice of the Commission both in air mail and railway mail cases was to make its rate orders effective as of the date a proceeding was initiated.

TWA has now come forth with a new set of arguments designed to minimize the reliance to be placed on this legislative history. It contends, in the first place, that the foregoing legislative history of the "make effective" clause should not be considered at all because S. 2 and H. R. 7273 were not passed, and that the 1938 bills which ultimately became law were "greatly recast." It urges that "the only valid legislative history of Sec-

tion 406 (a) (1) appears in the Conference Report issued in June, 1938" (Br. 62, 72–73). This argument wholly overlooks the fact that during the hearings on the 1938 bills, which ultimately became the Act, Colonel Gorrell, at the request of both the Senate and House Committees, stated that he "would not cover any of the details which we covered last year," and cited the pages of his previous testimony to the Committees. It is perfectly clear that these statements, made in the spring of 1938 just prior to the passage of the Act, incorporated by reference all of Colonel Gorrell's testimony on the 1937 bills. It is apparent also that although the Act may have been "greatly recast" in some respects, no significant changes were made in the mail-rate provisions and it was therefore unnecessary for Colonel Gorrell to repeat his testimony of the preceding year. Of course, the Conference Report on the bills which became the Act is significant to the determination of the meaning of the Act. However, the "generality" of the statement in that report relied on by TWA (Br. 45) shows that it "was totally unrelated to the specific problem here at issue" (Br. 72, note 107).

TWA's second objection to the use we make of the legislative history of the "make effective" clause is that "the rate making provisions of the 1937 bills were entirely different from those of the Air Mail Acts. All the 'minutiae of ex-

pression * * * that show Congress to have been thinking of the future' * * * were eliminated" (Br. 64–65), and hence the "make effective" clause was not necessary merely to confer authority to fix rates back to the petition date. The meager examples it cites, and apparently there are no others, are both insignificant and inaccurate.[58] Both provisions conferred the same basic rate-making authority and prior to the

[58] TWA cites three instances (Br. 65 note 83). (1) It states that "rates were no longer to be fixed 'by order' which was to 'continue in force until changed.'" In fact, Section 314 of the 1937 bills (*Senate Hearings*, note 8, *supra*, p. 31), now embodied in Section 1005 (a) of the Act, provided that "all orders of the Commission * * * shall continue in force until its further order." Thus, the provision referred to by TWA was not eliminated from the 1937 bills, and the bills and the Air Mail Acts remained the same in this respect. (2) Next, TWA points to the elimination of the provision "permitting 'reexamination' of an order only after a 6-months waiting period." But the omission of this provision in the bills does not indicate that the bills were not concerned with the future aspects of mail rates. If the elimination of this provision has any significance, it is far outweighed by the elimination of the provision in Section 6 (c) of the Air Mail Acts, which specifically permitted the Commission to establish mail rates retroactively to March 1, 1935. (3) Finally, TWA refers to the provision in the 1937 bills (Section 406 (a) of the Act) that "the Commission was 'directed' to act at all times 'Upon its own initiative.'" This does not appear to be different in substance from the provisions of Sections 6 (a) and 6 (b) of the Air Mail Acts, and the practice thereunder. In any event, it can hardly be argued that because the 1937 bills directed the Commission to proceed upon its own initiative, the mail rates subsequently fixed by the Commission would not have future application, particularly since the Commission was directed to act from "time to time."

Gorrell amendment, both were subject to dispute as to the power to fix rates back to the petition date.

In the third place, TWA criticizes our analysis on the ground that Commissioner Mahaffie's disagreement with the Commission only arose over the question whether air carriers were compelled to render service under the Air Mail Acts, and since there was no doubt but that air carriers were required to render such services under the 1937 bills the point of disagreement would not have been perpetuated by the 1937 bills (Br. 65–66). This is inaccurate. It is true that Commissioner Mahaffie disagreed with the majority of the Commission when it relied on the *New York Central* case in awarding mail pay under the Air Mail Acts back to the date of a petition. It is also true that his disagreement was predicated on the fact that air carriers were not compelled to carry the mail. However, it is *not* true that air carriers *would* be compelled to carry the mail under the 1937 bills, as TWA contends. Under Section 305 of the 1937 bills (Section 401 of the Act) air carriers were permitted to apply for certificates of convenience and necessity without requesting authority, or accepting the obligation, to transport mail. *Senate Hearings*, note 8, *supra*, pp. 22–24. The suggestion that every certificate should require the carrying of mail, a situation characterized as being like that existing for railroads, was discussed in detail

by Colonel Gorrell, who opposed such a requirement for air carriers because the airlines' economic situation differed from that of the railroads, and the suggestion was never accepted by the Committee (*Id.* at pp. 455–458).[59]

Thus, the airlines' situation was quite different from that of the railroads; petitioner concedes that the railroads had no duty to carry the mail

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[59] Colonel Gorrell described the proposal, which, he said, "seems agreed * * * would be undesirable", as follows: "In other words, although with respect to applications for certificates to operate a service between any particular points the Commission would be free to determine whether a certificate should be granted for passengers, or for express, or for freight, or for all of such classes of service, the Commission would not be free to grant a certificate which would exclude authority to carry mail; every certificate, no matter for what class of traffic, would carry with it the authorization to carry the mail whenever the Postmaster General desired to place mail upon the craft of that carrier between the points in question.

"This method of dealing with the problem is, as I have said, substantially the method adopted in the case of the railroads. That is, every railroad is under an obligation to carry the mail if the Postmaster General desires to place mail upon its trains." (*Senate Hearings*, note 8, *supra*, pp. 455–456.) He summarized his reasons for indicating why such a proposal was apt for railroads but not for airlines in the following language: "As I have said, the method adopted in the case of the railroads is perfectly appropriate for that industry because of the relatively minor part that the mail traffic plays. Every railroad, if it is able to enter business at all, is able to carry the mail, and if there is enough traffic generally to justify a new service the presumption is that an additional railroad mail carrier will not seriously affect the position of other such carriers. Among air carriers, however, this situation does not obtain" (*Ibid.*, at p. 457).

prior to the Railway Mail Pay Act (Br. 46–47), but were compelled to do so by that enactment (Br. 49), unless they discontinued their railroad operations. Under the 1937 bills, and the Act itself, air carriers could be authorized to continue all of their existing operations except the carriage of mail, although practically, in view of the benefit of the mail subsidy to them, a request for such limited authorization would be unlikely. Commissioner Mahaffie could have pointed out the same kind of thing that he pointed out in his dissenting opinion under the Air Mail Act, namely, "The air line is under no legal compulsion to become a contractor [carrier]." *Air Mail Compensation*, 216 I. C. C. 166, 192.[ggg] Indeed, the voluntary character of a carrier's operations under the Civil Aeronautics Act was recently pointed out by the

[ggg] This is also the fallacy in TWA's contention that if Congress had wished to codify such power as existed under the Railway Mail Pay Act it only had to copy the language of that Act, without adding the "make effective" clause (Br. 45, 72). Since the 1937 bills did not compel carriers to carry mail unless they chose to do so, their situation differed from that of railroads. It was precisely this difference between involuntary carriers under the Railway Mail Pay Act and voluntary carriers under the Air Mail Acts that led to disagreement in the Commission and between witnesses and legislators at the hearings. Recognizing that if it used the same language as in the earlier acts, it would carry over the existing disputes as to what the language meant, Congress altered the language to make clear that under the new Act mail rates could be made effective as of the time a petition was filed.

Court of Appeals in another proceeding arising out of the Board's decision in this case.[81] It is evident, therefore, that the disagreement in the Commission over the Air Mail Acts would have been perpetuated had the 1937 bills been enacted into law without the addition of the "make effective" clause.

Finally, TWA says that our analysis of the legislative history of the "make effective" clause is wrong because, in addition to the disagreement under the Air Mail Acts as to whether rates could be made effective back to the date of a petition rather than from the date of issuance of an order, there was also disagreement as to the power of the Commission to make rates retroactive generally, and that the disagreement concerning the general power of the Commission was also resolved in favor of the regulatory body (Br. 66–72). In support of this proposition, TWA argues first that the difference between Commissioner Mahaffie and the Interstate Commerce Commission was of this dual character. However, the dissenting opinions which it cites do not bear out its contention.[82] It is perfectly plain, considering all

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[81] *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, decided December 6, 1948, where the court stated: "The Civil Aeronautics Act, *under which Capital chose to operate*, embodies a scheme," etc. [Italics supplied.]

[82] The three cases relied on by TWA are cited on page 66 of its brief in note 87. An analysis of Commissioner Mahaffie's dissent in these cases follows: In *Air Mail Rates For Route No. 31*, 216 I. C. C. 381, 404, Commissioner Mahaffie

of Commissioner Mahaffie's dissents, that the disagreement among the members of the Interstate Commerce Commission was limited to the narrow question of whether the Commission had authority

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discussed the facts of the case and stated: "In my opinion, we are not justified on this record in attempting to adjust compensation for the carrying of air mail so as to make the entire operation profitable." Commissioner Mahaffie urged that, on the facts of that particular case, there was no basis for fixing higher rates back to March 1, 1935. The Act specifically conferred power to fix rates back to March 1, 1935, and Commissioner Mahaffie did not unqualifiedly dispute that power as he did in the cases where the Commission fixed rates retroactively to the date of a petition. In *Air Mail Compensation*, 222 I. C. C. 602, 610, Commissioner Mahaffie dissented on the sole ground that the Commission was without power to fix a rate retroactively to the date a petition was filed. There is no basis for concluding that he dissented because "the Commission amended a 1935 order by a proceeding begun in 1937, so as to insert a proviso which had the effect of reducing rates from 1935," as TWA suggests. The amendment inserting the proviso was dealt with summarily by the Commission and not mentioned in the dissent. Moreover, in *Air Mail Compensation*, 232 I. C. C. 608, 614, the third case relied on by TWA, where the Commission "amended the order again and struck out the proviso," Commissioner Mahaffie dissented without opinion. To the extent that the two cases last cited involve any problem of retroactivity different from the issue as to whether the Commission was empowered to make its rates effective as of the date of the filing of the petition, the problem is not unlike that involved in the Board's "reopening" cases, discussed *infra*, pp. 7–78.

In contrast to the foregoing dissenting opinions, in every case in which the Commission fixed a mail rate back to the date of a petition, Commissioner Mahaffie dissented with the statement that he was doing so for the reasons stated in his dissenting opinion in *Air Mail Compensation*, 216 I. C. C. 166, 191 (see Pet. Br. 57, note 70).

to fix mail rates back to the date of a petition or whether it was restricted to making such rates effective from the date of issuance of an order.

It is equally clear, contrary to TWA's second argument on this point, that the disagreement between witnesses and legislators at the hearings on the 1937 bills concerned precisely the same issue. It may be conceded that during the hearings there were some general references to retroactivity, including references to rates being made retroactive to March 1, 1935, as specifically provided in the Air Mail Acts, and that "charges and counter-charges of all sorts were made." (Pet. Br. 68.) Nevertheless, it is crystal clear that as the argument developed, it narrowed into the precise question of whether the Commission had authority to fix mail rates back to the date of a petition. Colonel Gorrell resolved the issue. He addressed himself at length to this precise problem and concluded that "there is no substantial doubt but that the Commission is to put a rate order in effect as of the date when the Commission has been formally advised an unjust rate then and there existed" (*supra*, pp. 56–57). His statement is replete with references to a specific proceeding in which the Commission fixed a rate back to the date of a petition. His whole concern was with that problem. He made no reference to any general problem of retroactivity, although such

problem had been mentioned in the hearings.[63] He then offered the "make effective" clause amendment to preserve that power and his explanation leaves no doubt on that score. TWA's belated attempt to confuse what is clear takes no account of these facts. Far from being concerned here with "mute intermediate legislative maneuvers" (Br. 72), we are concerned with a prepared, detailed statement on a narrow issue by the person who offered an amendment which ultimately was incorporated into the Act without change. Such evidence is conclusive.

TWA urges further that the "make effective" clause cannot have the limited meaning Colonel Gorrell indicated because the language used was too broad, particularly when viewed in the light of the language of other parts of the Act (Br. 18–19). It may be conceded that the "make effective" clause could have been drawn more narrowly and have accomplished its purpose; it must likewise be conceded that it was adequate to accomplish the purpose of the draftsman. The most likely reason for the difference between its language and that of other parts of the Act is that they were prepared by different draftsmen,

[63] This situation differs sharply from that in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446 (Pet. Br. 71, note 106). In this case, Colonel Gorrell was not only aware of the general problems of retroactivity, but he specifically limited himself to providing an answer to the question whether the Commission should have power to fix mail rates back to the date of a petition.

the "make effective" clause being engrafted onto a completed bill. It is unnecessary to speculate, however, on the reasons for such differences. The meaning of the "make effective" clause is abundantly clear from its legislative history. If the remainder of the Act is examined, we get confirmation, rather than denial, of the fact that the meaning of the "make effective" clause is limited to conferring authority on the Board to make mail rates effective from the date of initiation of a mail rate proceeding, for any broader interpretation would destroy the rate-making pattern which is fundamental to the Act.

It must be concluded, therefore, that the "make effective" clause does no more than clearly authorize the Board, where it determines such action to be proper, to make its mail rate orders effective from the date of the initiation of mail rate proceedings. This being so, the "make effective" clause cannot have the effect petitioner claims for it, with the result that the decision of the Court of Appeals must be affirmed.

C. THE BOARD'S PRIOR ADMINISTRATION OF THE ACT SUPPORTS THE CONCLUSION REACHED BY IT IN THIS CASE

1. *The Board has consistently refused to fix mail rates to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding.*—The only sound way to determine

the Board's construction of the Act with reference to the issue raised by this case is to examine its previous decisions where that issue was raised and decided.[44] There are eight such determinations and in every one of them the Board refused to fix a final rate prior to the petition date. The Board explained its position as follows (*Continental Air Lines, Inc., Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401):

> Aside from the question of whether it [the Board] has the statutory power to review a rate prior to the date of the institution of the proceeding, it seems desirable as a matter of policy that the rate for any given period become finally fixed at some point in time and that such point be that at which the rate is first challenged or questioned by the institution of a rate proceeding by the carrier or by the Board. Such a policy appears to be fair since it permits every rate order to be final for any period during which it is not questioned by a proceeding looking toward its revision.

In seven other decisions on this issue, prior to the determination in the case at bar, the Board followed the same reasoning and reached the

[44] TWA cites a series of instances in which the Board is alleged to have exercised the statutory power now in issue. These cases, involving various factual situations unlike that in the case at bar, will be considered below, pp. 74–80.

same conclusion although in the later cases it made no reference to its statutory authority.[65]

From these decisions it is apparent that the Board has never asserted its alleged power to redetermine rates "retroactively," but, on the contrary, has specifically reserved the question of its statutory authority to do so. In each instance, *without examining the past period,* it has refused to fix rates "retroactively," on grounds of "sound general policy" (R. 15). In deciding these cases on one of two available grounds, the Board was following a commonplace judicial technique, which in no way indicated that it believed the statute authorized it to review rates "retroactively."

2. *All of the instances cited by petitioner involve different factual situations and in none of them did the Board indicate that it had the asserted power.*—TWA attempts by reference to

[65] *Continental Air Lines, Inc., Mail Rates for Routes Nos. 29 and 43*, 2 C. A. B. 683, 688 (1941); *Mid-Continent Airlines, Inc., Mail Rates*, 3 C. A. B. 464, 466 (1942); *Braniff Airways, Inc., Mail Rates*, 3 C. A. B. 633, 635–637 (1942); *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143 (1943); *All American Aviation, Mail Rates*, 4 C. A. B. 354, 357 (1943); *Pan American Airways, Inc. Alaska Mail Rates*, 6 C. A. B. 61, 69 (1944); *Caribbean-Atlantic Airlines, Inc., Mail Rates*, 7 C. A. B. 943, 946 (1947). In the *All American Aviation* case, the Board stated, "Moreover, adoption of respondent's contention would, in effect, result in the establishment of a 'cost plus' system of rate making and would tend to destroy respondent's incentive to develop air express and to maintain costs at a reasonable level."

isolated decisions and actions of the Board in wholly different factual situations to establish that the Board has fixed rates prior to the date a proceeding was initiated, or "retroactively," hoping thereby to create an inference that the Board has interpreted the Act as authorizing it to revise rates "retroactively" in the situation under consideration (Br. 85–97). We shall discuss these cases on the basis of the classification used by the petitioner:

a. *The new route cases.*—In these cases, the Board fixed an initial rate for new routes from the date operations commenced thereon even though that date was prior to the initiation of the rate proceedings.[66] Since no rate had ever been fixed for these operations, the Board did not ret-

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[66] *All American Aviation, Mail Rate for Route No. 49*, 3 C. A. B. 79 (1941); *United A. L. Mail Rate for Route No. 57*, 3 C. A. B. 381 (1942); *Caribbean-Atlantic Air Mail Rates*, 6 C. A. B. 407 (1945); *Pan American Airways, Inc., Alaska Mail Rates*, 6 C. A. B. 61 (1944), where in the same proceeding the Board refused to revise a rate "retroactively" but fixed a rate for a new route prior to the date the proceeding was initiated. The Board stated at page 70: "Accordingly, the review of the rates for these routes [Juneau-Whitehorse and Whitehorse-Fairbanks] will be confined to the period on and after the date of the filing of the petition. The period of review for the Seattle-Juneau route, however, will commence on June 21, 1940, as that was the date of inauguration of mail service on that route and no rate has heretofore been fixed." Obviously, the Board did not think its new route doctrine was inconsistent with its refusal to revise final rates "retroactively" or it would not have applied both principles in successive sentences in the same opinion.

roactively revise a final rate prior to the petition date as TWA seeks to have it do here. The finality of a Board rate order was not impaired. See *infra*, pp. 83–85.

b. *The system cases.*—In these cases,[67] the Board merely extended the new route doctrine to a carrier with old routes, the existence of more than one route necessitating the determination of "need" on a system basis.[68] In neither of these cases did the Board's order revise the previously

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[67] *Western Air Lines, Mail Rates*, 4 C. A. B. 441 (1943); *Northeast Airlines, Inc., Mail Rates*, Order Serial No. E-1230, decided February 26, 1948. TWA also cites *Colonial Airlines, Mail Rates*, Order Serial No. E–1263 (March 4, 1948) but this case merely fixed a temporary rate which is expressly subject to revision when the final rate is fixed. Order Serial No. E–1340, April 1, 1948.

[68] Section 406 (b) provides that, in determining a mail rate, the Board must consider the "need" of each "air carrier" for compensation which "together with all other revenue of *the air carrier*" will permit the achievement of the statutory objectives. (Italics supplied.) The examination of the revenues of the carrier on a "system or over-all basis" is, therefore, "necessitated" irrespective of whether the rate is fixed on a route or a system basis. As the Board stated in an earlier case (*Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143 (1943)), in concluding that TWA's rates should be reviewed on a system basis: "* * * petitioner requested the fixing of fair and reasonable rates for route No. 2 only. However, under the provisions of the Act we are required to determine the need of a carrier for mail compensation sufficient to enable it, together with revenue from all sources, to continue to render adequate transportation service. Under the present circumstances the Board deems it necessary to review the operations of petitioner as a whole although we may fix a rate for a single route if such a review indicates the necessity therefor."

fixed final rate for the old route although it examined the rates for such routes in order to determine the "need" of the system as a whole. Nor do these cases afford any basis for concluding that the Board interpreted the Act as giving it power to make such revisions.

c. *The "reopening" cases.*—In one[69] of the two cases cited (Br. 89–91), the Board reopened merely for the purpose of clarifying an ambiguous order and applied the clarification as of the effective date of the original order. In the other,[70] the Board reopened a proceeding promptly and then later broadened the reopened proceeding to specifically encompass additional issues.[71] In both cases the reopening was a

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[69] *Pan Am. Airways Co. (Del.), Transatlantic Mail Rates*, 1 C. C. A. 220 (1939); *Pan Am. Airways Co. (Del.), U. S.-Azores Mail Rates*, 1 C. A. A. 650 (1940).

[70] *Pan. American Airways, Inc.; Latin-American Mail Rates*, 6 C. A. B. 85 (July 17, 1944, Supplemental Opinion).

[71] The original opinion was issued on August 28, 1942. *Pan American Airways, Inc. Latin-American Rate Case*, 3 C. A. B. 657 (1942). Pursuant to the request of the carrier dated October 22, 1942, the Board, by order (Serial No. 2051) dated November 25, 1942, "reopened" the proceeding "for rehearing, reargument, and reconsideration * * *" (6 C. A. B. 85). "Subsequently it was brought to the Board's attention that certain amounts had been erroneously included in the computation of respondent's investment upon which a return was allowed for rate-making purposes in our original opinion. Accordingly, by order [Serial No. 2726] of February 28, 1944, the proceeding was further reopened so as to permit revision of respondent's investment in this respect". (6 C. A. B., at pp. 85–86). The modified order was made effective as of the same date as the original order (6 C. A. B. at p. 94).

proper exercise of the Board's power,[72] and neither case can fairly be construed as retroactively revising a final rate under the disguise of reconsideration.

d. *The "American" case.*—This case[73] was limited to fixing a rate back to the date of the institution of the proceeding. The revision of the rate prior to that date was not in issue. The statements of the Board so often quoted by TWA (Br. 17, 39–40, 51, 61, 76, 83) were directed solely to the power to fix a rate back to—not before—the date the proceeding started. Cf. Pet. Br. 79.

e. *The nunc pro tunc petition device.*—While the Board memorandum of June 3, 1942 proposed a limited use of such petitions in a special war time situation for a limited period of 17 days, no petitions were actually filed. In making this offer, the Board was not directing its attention to the question of whether the statute authorized it to revise rates "retroactively" but was concerned with finding a practical means of fulfilling its promise to the carriers, made in the memorandum of May 22, 1942, to institute rate proceedings as of June 1. If the memorandum of June 3, 1942 evidenced the Board's conviction that it had

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[72] Sec. 1005 (d), 49 U. S. C. 645 (d). This Section provides: "Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

[73] *American Air Lines, Mail Rates*, 3 C. A. B. 323 (1942).

power to revise mail rates "retroactively", then the elaborate proposal in the memorandum to treat petitions filed between June 3 and 17 as having been filed on June 1 was wholly unnecessary because, on such an assumption, it could have made its ultimate rate orders effective on June 1.

No instance has been cited, because there is none, where the Board fixed a new mail rate applicable to a period during which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding, as TWA seeks to have it do here. Nor has any instance been cited where the Board has said or done anything from which it may reasonably be inferred that the Board believed it had power to take such action.

We have sought to demonstrate that the Board decisions upon which the petitioner relies have no bearing on the issue with which this case is concerned. But even if these cases, or some of them, may be deemed to have some relevancy, they are not decisions in which the Board has consciously and carefully, after thorough consideration, rejected a previously consistent course of conduct.[74] Only a deliberate administrative judgment is

[74] *United States* v. *Alabama Southern Rd. Co.*, 142 U. S. 615.

given weight in the resolution of a controversy as to the meaning of a legislative enactment.[75]

All of the cases relied on by petitioner were fully presented to the court below. Upon consideration of them the Court of Appeals concluded (R. 115):

> TWA * * * urges what it considers examples of retroactive application of Board orders. But we do not find those instances indicative of the retroactivity which is necessary to support its position here. TWA also urges the implications from the Board's failure, over the years, to say it had no retroactive power. We think that the administrative history of this statute has no material bearing one way or the other upon the question of statutory power.

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[75] *Skidmore* v. *Swift & Co.*, 323 U. S. 134. This Court there stated with reference to the Interpretative Bulletins of the Wage and Hour Administrator:

"They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy" (323 U. S. at 139).

The Court went on to state (323 U. S. at 140):

"The weight of such [a ruling, interpretation or opinion] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control".

It is apparent that under these standards, opinions of the Board which do not relate to the question of statutory construction at issue, as is true of the cases relied on by TWA, are entitled to no weight.

3. *The general practice of the Board in fixing future rates is inconsistent with the existence of the power to refix final rates prior to the petition date.*—It bears repeating that the Board views the Act as establishing a rate-making method for the determination of mail compensation as contrasted with TWA's view that the Act establishes a cost plus system of auditing for such purposes. This means that the Board is interested primarily in fixing fair and reasonable *rates* of compensation for the *future* rather than fixing fair and reasonable *amounts* of compensation for the *past*. It means further that the rate orders of the Board have the attribute of finality and are not always subject to revision.

During the ten years of its existence, the Board has been concerned consistently and substantially in fixing fair and reasonable rates for the transportation of mail by aircraft to be applicable in the future.[76] It would serve no purpose to examine all of the numerous similar mail rate decisions. It will suffice to refer to the typical decision in the rate proceeding involving TWA, which TWA now seeks to nullify (see pages 4–7, *supra*), and the Board's statement in *Chicago and Southern Air Lines, Mail Rates*, 4 C. A. B. 419 (1943), where the Board denied the carrier's request that

[76] *First Annual Report of the Civil Aeronautics Authority* [Board] (1939), p. 21; *Annual Report of the Civil Aeronautics Board, 1941*, pp. 7, 15; *Annual Report of the Civil Aeronautics Board, 1943*, p. 25; *Annual Report of the Civil Aeronautics Board, 1947*, p. 11.

a reduction in rates be deferred until it had an opportunity to accumulate net earnings sufficient to yield a fair return on its investment from the beginning of operations. The Board stated (p. 420):

> The mail-rate provisions of the Civil Aeronautics Act do not call for what would be in effect a revision of historical earnings so as to reimburse the carrier for inadequate profits received in the past; those provisions require the establishment of present and future rates which will enable the carrier under honest, economical, and efficient management to discharge its public service obligations as specified by the Act. The statutory policy is not remedial of past inadequacies; it is instrumental of present and future accomplishment.

Since the Board's practice has been to establish mail rates for the future it must have construed the statute as giving those rate determinations finality. It cannot reasonably be assumed that the Board would expend time, effort and money to fix future rates if it construed the statute as requiring it to replace all such determinations with the results taken from audits made after the facts became known. It is submitted that the practice followed by the Board in administering, and deciding cases under, the mail rate provisions of the Act shows a course of conduct which is only consistent with the view that its mail rate orders have the attribute of finality.

It does not follow, however, that the Board never makes a rate order effective as of a date preceding its issuance. As we have seen in the preceding section of this brief, the "make effective" clause was designed to make clear that the Board had power to make its mail rate orders effective from the date rate proceedings were initiated, notwithstanding that the order was not issued until a much later date. In its first mail rate decision,[77] the Board used the discretion conferred by the "make effective" clause, stating: "We find * * * the fair and reasonable rate of compensation * * * from and after October 22, 1938, the date of the filing of the petition herein, is * * *." This practice has generally been followed by the Board,[78] with the result that in most mail rate decisions the Board is not only fixing rates for the future but also for the past period between the initiation of the proceeding and the issuance of its decision.

Likewise, the Board's practice of issuing temporary rate orders under certain circumstances while it is conducting permanent rate investigations results in a readjustment of the compensation paid to the carrier under the temporary rate

[77] *Mid-Continent Airline, Inc., Mail Rates*, 1 C. A. A. 45, 58 (April 14, 1939).

[78] *Annual Report of the Civil Aeronautics Board, 1943*, p. 17; see *Continental Air Lines, Inc., Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401 (1942), and cases cited therein.

on the basis of the final rate when it is ultimately determined.[79] In these situations, and others,[80]

[79] A "temporary rate order does not fix a final rate but merely establishes a conservative basis for payment upon estimated accrued obligations of the Government pending the determination of a permanent rate which may be either higher or lower than the temporary rate theretofore in effect." *National Airlines, Inc., Mail Rates*, Order Serial No. E–1271, decided March 5, 1948, p. 5. Temporary rate orders are issued in two classes of cases: (1) where a new air carrier without past operating experience is involved, and the failure to establish a temporary rate and afford some mail compensation would result in the undue dissipation of its working capital (*Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687 (1946); *Challenger Airlines Company*, Order Serial No. E–560, decided May 21, 1947); and (2) where a carrier shows financial necessity. In order that a carrier be placed in this class, "First, there must be a showing that its immediate financial position is critical. Secondly, it must appear that its existing rate is substantially inadequate." *National Airlines, Inc., Mail Rates*, *supra*, p. 6. TWA's comment (Br. 85, note 124) that a temporary rate is frequently increased retroactively to a date prior to the institution of the proceeding brought to change the temporary rate is accurate but of no significance. The temporary rate is never made effective prior to the date when the permanent rate ultimately fixed will be made effective. The temporary rate procedure is designed to relieve carriers from hardships during the pendency of the investigation of final rates and obviously must be flexible if it is to be of any value. Of course temporary rates are always adjusted in accordance with the rates finally determined.

[80] The Board has interpreted Section 405 (a) of the Act (52 Stat. 994, 49 U. S. C. 485 (a)) as granting it authority to make mail rate orders effective prior to their issuance in the situations there described. *Alaska Airlines, Inc., Mail Rates*, Order Serial No. E–1885, decided August 13, 1948. A similar situation appears to exist under the provisions of Section 405 (b) of the Act.

the order of the Board may be termed "retroactive" in effect. It is important to note, however, that these orders are not "retroactive" in the sense that TWA uses the term, for *none of these orders superimpose new rates on rates previously and finally fixed.*

This distinction is important because "retroactive" orders of the kind the Board admittedly issues do not destroy the rate-making method as the primary determinant of mail compensation, whereas "retroactive" orders of the kind contemplated by TWA make all rate orders subject to revision and result in a cost plus system of auditing becoming the ultimate method for determining mail compensation. For, under petitioner's construction, there will invariably be a contention that the fair and reasonable future rate fixed by the Board should be revised by a post-audit after the results of operations under it become known in order to supplement or reduce the level of profit achieved. Under these circumstances, the rate-making process would lose all significance (Cf. Br. 42–43).

4. *The practice of the Board produces no incongruous results.*—TWA attempts to show that the general practice of the Board, as set forth above and sanctioned by the Court of Appeals, cannot be what was intended because it produces such incongruous results. One such result, it is claimed, is the inability of the Board to correct its rate "predictions"

or "prophecies," which are necessarily difficult to make accurately. (Br. 8, 13, 77, 84.) In fixing a future mail rate there is, of course, a risk that the estimates made by the Board may not be realized or may be exceeded. Such risks may be minimized in different ways. In the Civil Aeronautics Act, Congress did so by providing that rate determinations be made by the Board after notice and hearing, followed by review in the courts, and that such rates could be changed in new proceedings, similarly safeguarded, initiated by any of the interested parties at any time. Clearly, the Act establishes a procedure giving the Board a high degree of flexibility in correcting its "prophecies."

TWA complains, however, that the device of filing a petition at any time to protect against changes in circumstances affecting a mail rate unfairly discriminates between carriers because it makes relief dependent upon the "lucky coincidence" of having a petition on file when "catastrophe" strikes, and "rewards the rash and penalizes the prudent airline" (Br. 19–22). As an example of the "lucky coincidence" argument, it points to a situation where aircraft used by two airlines are suddenly grounded. Carrier X, which has a petition on file for other reasons, will be protected, while carrier Y, with no petition on file, will be unable to obtain "full redress," the argument runs. Actually, there is no discrimination because carrier Y and carrier X receive the same protection from the Board against sudden

groundings," or other "catastrophes."[82] In a recent opinion the Board explained its position as follows:[83]

> While costs attributable to the grounding of aircraft types are neither normal nor recurrent in nature, such costs are, nevertheless, peculiar to the air transportation industry and must be taken into consideration in establishing both mail and non-mail rates for air carriers. But costs of this nature are neither predictable nor capable of accurate measurement on a prospective basis. No accurate prediction can be made as to the incidence of the cost with respect to a particular carrier although the risk that such cost may be incurred exists in the case of all carriers. The imminence and universality of a contingency such as this cause it to become established as one of the risks of doing business which is reflected as a normal cost of capital rather than as a normal cost of operations.

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[81] *Braniff Airways, Inc., Mail Rates*, Order No. E-2129, October 28, 1948.

[82] In *National Airlines, Inc., Mail Rates*, 7 C. A. B. 387 (1946), the Board held that costs attributable to accidents are not allowable for rate-making purposes. In *National Airlines, Inc., Temporary Mail Rates*, Order Nos. E-2237 and 2285, December 11, 1948, the Board refused to recognize strike losses for purposes of establishing a temporary rate because they were abnormal.

[83] *Braniff Airways, Inc., Mail Rates, supra.* TWA's quotation of only part of this explanation is quite misleading. (Br. 20, note 17).

The treatment of all carriers, whether "rash" or "prudent" or "lucky" or "unlucky" in filing petitions, is therefore the same in connection with "catastrophes", "disasters", or "calamities". Such risks are capital risks and not operating risks. The cost incurred as a result thereof are not reimbursed as operating expenses but in the rate of return which is calculated on the basis of the long term risks of the business. The protection afforded carriers for losses because of catastrophes is not dependent upon the filing of a petition but upon the payment over a period of time of a rate of return commensurate with the long run risks inherent in the air transport industry.

If the Board should fix a rate in which the return on investment did not fully recognize those risks, its order would, of course, be subject to judicial review. Actually, because of the risk of catastrophes, the Board has given air carriers a high rate of return on their investment. Thus, in the decision which TWA now seeks to destroy by a retroactive revision of rates, the Board fixed a rate calculated to give TWA a return of 13.77 per cent, *after* taxes, on its investment (see page 7, *supra*).

In considering the risks of the business in computing the rate of return, the Board was following the accepted practice in public utility rate

making."[84] While "groundings" may be a risk peculiar to air carriers, public utilities are also subject to "catastrophes", of different kinds including strikes, floods, hurricanes and explosions. The courts have given no indication that the possibility of the occurrence of "catastrophes" affecting a public utility, makes the refusal to reimburse past losses in a rate "arbitrary" and "unfair".[85]

Since it appears that airlines receive the same treatment with respect to disasters irrespective of whether they have a petition on file with the Board, we turn now to the problem of losses arising from normal changes. Such changes concern variations in the volume of traffic, in the level of costs, and similar factors, rather than catastrophes. They do not change abruptly from day to day.[86] Nor does a reasonable rate become confiscatory at a given hour, or on a given day.

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[84] *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S. 679.

[85] The past losses which the utility sought to recoup in *Galveston Electric Co. v. City of Galveston*, 258 U. S. 388, resulted from the Galveston hurricane.

[86] In the decision which TWA now seeks to destroy by a retroactive revision of rates, the Board stated it was fixing a rate which would provide a fair and reasonable return "although on the basis of reported results for selected short periods the rate may appear either unduly high or unduly low" (see page 6, *supra*).

On the other hand, it need not take very long for a carrier to file a petition.[87]

The complexity and time-consuming nature of the task of preparing a petition may be judged by reading TWA's petition in the instant case (R. 8–13). This petition is typical. The Board's regulations do not require that a petition be supported by profound economic studies. All that is required is that the petitioner state the rate which it believes fair and reasonable. This requirement, in practice, has imposed no burden as carriers commonly petition for the highest conceivable rate and, should they err in the original petition, the Board has freely permitted amendments. In any event the rate finally fixed by the Board must be based upon the evidence of record rather than the rate asked for in the petition.

TWA also argues that a new petition may be filed by a carrier the day after the Board fixes a future rate and that the rate fixed on the new

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[87] The Board's Economic Regulations only require that mail-rate petitions be verified by three officers, in the case of a corporation, and that the following information be included:

"The petition should, in accordance with the provisions of section 406 (c) of the Act, include a statement of the rate the petitioner believes to be fair and reasonable. In this connection, the rate-making elements set forth in section 406 (b) of the Act should be particularly considered by the petitioner in the preparation of the petition. Opportunity for argument will be given at the public hearing."

Civil Aeronautics Board, *Economic Regulations*, Part 216.1 (f); (14 Code of Fed. Reg. (1938 Supp.), Sec. 216.1 (f)).

petition would govern the period after its filing so that the first rate would "never have been 'final' in the sense of having been immune from revision for any period of time" (Br. 76). The same argument was addressed to, and answered, by the Board (R. 87–88):

> It has been suggested that it will be the effect of this decision to cause all carriers to keep a "protective" petition on file with the Board at all times in order to prevent unpredictable losses. We do not anticipate this development. From management's viewpoint the situation will not be materially different from that which has existed heretofore. The carriers have long been aware of our unbroken policy not to fix retroactive rates. Furthermore, the Board has exactly the same authority with respect to the date from which it can make its mail rate orders effective, whether a new rate be higher or lower than one previously in effect. Unless a carrier believes that it will realize less than a fair and reasonable return from the date on which it files, there would be little point in filing. Should it file and thereafter earn more than a fair and reasonable return, our rate order, effective from date of filing, would effect a reduction in mail pay from that date forward.

The fact is that for over ten years the Board has refused to revise final rates retroactively, and the Board has received only a handful of protec-

tive petitions. Experience shows that "protective" petitions have not converted the Act into the "cost-plus" pricing device which TWA seeks to create.[88] Recent actions of the Board in recapturing excessive profits earned during the pendency of a "protective" petition will undoubtedly further discourage the filing of such petitions.[89]

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[88] Carriers have been reluctant to file "protective" petitions. Among the reasons why this is true may be the following: the pendency of a mail rate proceeding creates uncertainty; profits earned may be subject to recapture; financial statements cannot be final, and the ability to float securities or negotiate loans is impaired. Indeed the experience of the Board indicates that rate finality is dictated not only by the provisions of the Act but by the necessities of business operations.

[89] *Western Air Lines, Inc., Mail Rates*, Statement of Tentative Findings and Conclusions, Order No. E–2333, December 30, 1948. The Board stated (p. 4): "For approximately a year and a half following the filing of its petition Western earned a greater return on its investment under the service rate fixed by the Board on November 8, 1943, than the Board is currently providing carriers for past periods. During this period, the petition, from the point of view of Western, was protective in nature, since the mail rate as established was more than adequate to provide a reasonable return. It would be more advantageous to Western, therefore, if, as Western has informally requested, the Board were only to revise Western's mail rate from January 1946, when it first started to incur significant losses, since such a review would not result in offsetting relatively high profits earned from April 1944 to January 1946 against losses suffered subsequently. * * * The effect of keeping the mail rate constantly in issue through the device of "protective" petitions, is to place the carrier on a cost plus basis. It would obviously be inequitable and contrary to the public interest to provide protection to the carrier against losses without reciprocal

Finally, there may be considerable doubt as to whether a paper filed the day after a rate has been fixed constitutes a "petition", within the meaning of Section 406 (a) (1) of the Act. If it does not, or if it can be regarded as not filed in good faith, the Board may, of course, dismiss the proceeding promptly without a hearing. Clearly there can be no warrant for erroneously establishing a "cost-plus" system of auditing for the determination of mail pay because of the theoretical possibility that "protective" petitions may give rise to limited problems under the Act.

D. THE ACT NEED NOT BE INTERPRETED AS TWA SUGGESTS IN ORDER TO PRESERVE ITS CONSTITUTIONALITY

TWA is not here seeking a declaration of the unconstitutionality of the Act, but is simply seeking to have this Court construe the Act differently than did the Board and the Court of Appeals on the ground that otherwise the Act might be unconstitutional. TWA argues that notwithstanding the fact that the Act provides that TWA shall be given a fair and reasonable mail rate, that it may at any time petition for an upward revision of such mail rate to a fair and reasonable level, such revision to be effective as of the date of

protection to the Government against excess profits. Under all the circumstances, we find that it will effectuate the policies of the Act to make our rate order for Western effective from May 1, 1944, the approximate date of filing of the initial petition."

the petition, and that such rate determinations are subject to judicial review, the Act nevertheless would be unconstitutional if it failed to guarantee TWA a profit at all times.

TWA's position rests on the contention that it is compelled to carry mail and must, therefore, be paid the "just compensation" provided by the Fifth Amendment in accordance with this Court's decision in *United States* v. *New York Central R. Co.*, 279 U. S. 73. In that case, as noted earlier (*supra*, p. 52), this Court held that the Interstate Commerce Commission was empowered under the Railway Mail Pay Act of 1916 (39 Stat. 412, 39 U. S. C. 542) to make its rate orders effective as of the date the rate proceeding was initiated rather than upon the issuance of the order. However, the Court expressed the opinion that no constitutional right accrued until a petition challenging the rate was filed. It stated (279 U. S. at 78–79):

> *We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint.* * * * But the filing of an application expresses a present dissatisfaction and a demand for more. * * * If the claim of the railroads is just they should be paid *from the moment when the application is filed.* * * * [Italics supplied.]

This case, rather than supporting TWA's position, looks towards the opposite conclusion.

There is, moreover, a difference in the legal compulsion to carry mail imposed on railroads under the Railway Mail Pay Act and the provisions of the Civil Aeronautics Act relating to the carriage of airmail. The Railway Mail Pay Act required all existing railway common carriers to transport mail.[90] The Civil Aeronautics Act limited the carriage of mail to those authorized by a certificate of convenience and necessity to carry mail.[91] Existing air carriers were given the right to seek grandfather certificates authorizing air transportation for classes of traffic other than mail and under separate conditions the transportation of mail.[92] It is thus clear that

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[90] "All railway common carriers are hereby required to transport such mail matter as may be offered" (39 U. S. C. 541).

[91] "*Whenever so authorized* by its certificate, any air carrier shall * * * transport mail whenever required by the Postmaster General" (Sec. 401 (m), 49 U. S. C. 481 (m)).

[92] "If any applicant *who makes application* for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the [Board], upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic *for which authorization is sought, except mail*, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B)

while the railroads operating as of 1916, the date of the Railway Mail Pay Act, had either to carry mail or get out of the railroad business entirely,[93] air carriers had the legal option of carrying passengers and property without carrying mail at all.[94] When TWA "sought" its certificate to carry mail, it voluntarily accepted the obligation to carry mail in return for the protection and benefits afforded by the Act. The fact that there was an economic advantage in seeking a mail certificate, because of the broad benefits conferred by the need provisions of Section 406, cannot obscure the clearly voluntary nature of the obligation assumed. This is different from the abrupt legal compulsion imposed on the existing railroads by the Railway Mail Pay Act. See also *supra*, pp. 65–68. TWA's right to compensation for carrying the mail is defined by the Act—not by the Fifth Amendment.

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with respect to mail and all other classes of traffic *for which authorization is sought*, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail." (Sec. 401 (e) (1), 49 U. S. C. 481 (e).) [Italics supplied.]

[93] After the Transportation Act of 1920, railroads could not cease to be such without the approval of the Interstate Commerce Commission. (49 U. S. C. 1 (18).)

[94] In a major certificate proceeding now pending before the Board, the principal applicants are seeking certificates authorizing the large scale transportation of property only without the transportation of either passengers or mail. *Air Freight Case, Docket 810.*

The significant cases in the determination of the issue raised by TWA are public utility rate cases. In such cases, the utilities perform repetitive services at rates which are normally predetermined in accordance with a prearranged statutory plan, just as is true in the present case. These utilities operate under certificates of convenience and necessity similar to those issued to air carriers and are subject to the same type of compulsion to render service. The protection afforded to such utilities by the Fifth and Fourteenth Amendments is the index of the protection such provisions give to air carriers under the Act. If these constitutional provisions do not guarantee profits to other public utilities there is no reason to suppose that they embody such a guarantee for air carriers alone.[95] No citation of authority is required to establish the view that "fair and reasonable" rates for public utilities afford the substantive protection provided by the Constitution. Such rates deal with the future and are not normally concerned with reimbursement of past losses. They are not subject to revision with respect to completed transactions but are final. Such rates afford an opportunity to earn a fair return but do not guarantee that such a return will, in fact, be earned. This Court has repeat-

[95] We are referring only to the Constitution and not the Act. The Court below stated, "We cannot find in this statute any language which indicates that Congress intended to guarantee to every carrier a profit" (R. 114).

edly held that the Constitution does not guarantee the reimbursement of losses incurred by public utilities prior to the date of the petition.[96]

We submit that the Constitution does not guarantee a profit to air carriers alone. The failure of the Act to guarantee such a profit, therefore, does not render it vulnerable to a charge of constitutional invalidity. The Constitution does not require a different construction of the Act than was reached by the Board and the Court below.[97]

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[96] *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, quoted *supra*, pp. 35–36; *Galveston Electric Company* v. *City of Galveston, et al.*, 258 U. S. 388; *Georgia Railway and Power Company, et al.* v. *Railroad Commission*, 262 U. S. 625.

[97] In *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, *supra*, decided December 6, 1948, the Court of Appeals for the District of Columbia Circuit had occasion to rule on the precise question presented here. We believe that the Court correctly analyzed and disposed of the issue in stating the following: "4. The power to increase retroactively established rates which have prevailed unchallenged is not needed to vindicate the Constitutional requirement for just compensation (Fifth Amendment), or to fulfill any contractual obligation of the Government to the air lines. The Civil Aeronautics Act, under which Capital chose to operate, embodies a scheme of just compensation for services rendered to the Government by requiring that fair and reasonable rates be fixed from time to time for carrying of the mail (Section 406 (a)). This right is protected by the privilege accorded carriers to apply at any time for higher rates to compensate for future service to the Government. The Act, with its regulatory provisions, is not intended to underwrite profitable operation of a carrier's business, any more than statutes imposing regulation of public utilities are intended to insure them a net revenue. *Federal Power Commission* v. *National Gas Pipe Line Co.*, 315 U. S. 575, 590, 86 L. Ed. 1037 (1942), and cases cited."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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FEBRUARY 1949.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938,[1] as amended, are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

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[1] Act of June 23, 1938, c. 604, 52 Stat. 977; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign anod domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Certificate Required

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation; *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the [Board] shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Application for Certificate

(b) Application for a certificate shall be made in writing to the [Board] and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the [Board] shall by regulation require.

Issuance of Certificate

(d) (1) The [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Existing Air Carriers

(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the [Board], upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points

between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided*, That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the [Board] shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; * * *.

Authority to Modify, Suspend, or Revoke

(h) The [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to

comply, within a reasonable time to be fixed by the [Board], with an order of the [Board] commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the [Board] to have been violated. Any interested person may file with the [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Application for Abandonment

(k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the [Board] unless, upon the application of such air carrier, after notice and hearing, the [Board] shall find such abandonment to be in the public interest. Any interested person may file with the [Board] a protest or memorandum of opposition to or in support of any such abandonment. The [Board] may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Carrier's Duty to Provide Service, Rates and Divisions

SEC. 404. (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, ob-

serve, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Power to Prescribe Rates and Practices of Air Carriers

SEC. 1002

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the [Board] shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the [Board] shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Authority shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

Rule of Rate Making

(c) In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the [Board] shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Effective Date of Orders; Emergency Orders

SEC. 1005. (a) Except as otherwise provided in this Act, all orders, rules, and regulations of the [Board] shall take effect within such reasonable time as the [Board] may prescribe, and shall continue in force until its further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation:

Suspension or Modification of Order

Sec. 1005

(d) Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Judicial Review of [Board's] Orders

Orders of Authority Subject to Review

SEC. 1006. (a) Any order, affirmative or negative, issued by the [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Power of Court

SEC. 1006. * * * (d) Upon transmittal of the petition to the [Board], the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the [Board]. Upon good cause shown,

interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the [Board].

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SUPREME COURT U S

IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No. 387

387

TRANSCONTINENTAL & WESTERN AIR, INC., *Petitioner,*

against

CIVIL AERONAUTICS BOARD, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION OF CAPITAL AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF AS AMICUS CURIAE

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MOTION OF CAPITAL AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Capital Airlines, Inc., by its attorneys, hereby moves this Court for leave to file the attached brief as *amicus curiae* herein, pursuant to Rule 27 (9) of the Rules of this Court. This motion should be granted for the following reasons:

1. Like the Petitioner herein, Capital Airlines, Inc., holds certificates of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act of 1938, as amended.

2. Capital Airlines, Inc., has a vital interest in this proceeding. Like the Petitioner, Capital Airlines incurred very damaging financial losses because of the inadequacy of the mail rates which were established for it by the Civil Aeronautics Board. Like the Petitioner here, Capital Airlines petitioned the Civil Aeronautics Board for an increase in its mail rate for a period prior to the date of filing its petition.

3. In Capital's case (as in Petitioner's) the Board held, among other things, that it had no power to adjust the mail rate for any period prior to the filing of the petition. This ruling by the Board was affirmed by the United States Court of Appeals for the District of Columbia Circuit on December 6, 1948. Capital Airlines is now preparing, and will shortly file in this Court, a petition for a writ of certiorari.

4. Should this Court render a decision favorable to Petitioner in this case, such a decision would require that Capital's petition for a writ of certiorari be granted. It would also require a reversal of the decision of the United States Court of Appeals in Capital's case.

5. Only within the last week has Capital Airlines been apprised of the arguments advanced to this Court in Petitioner's brief. Capital fully endorses and subscribes to all of Petitioner's compelling points.

6. In addition to the points presented by Petitioner, there is a supplementary point which Capital believes will prove helpful to this Court in reaching its decision. Capital submits that the impact of the Fifth Amendment to the Constitution requires that the Civil Aeronautics Act be construed as conferring upon the Civil Aeronautics Board full power to grant Petitioner and Capital the relief they request.

7. The attached brief of Capital Airlines as *amicus curiae* covers this one point, and we submit that it is worthy of consideration by this Court in this vital case.

8. The Solicitor General has consented to the filing of this brief as *amicus curiae* but, because of the short time remaining before the oral argument of this cause, is constrained to condition his consent on this Court's granting to the Civil Aeronautics Board leave to file a reply to Capital Airlines' brief within 10 days after the oral argument. We join with him herewith in requesting such leave.

9. Copies of this motion and the attached brief have been served upon the Solicitor General, the general counsel of the Civil Aeronautics Board, and counsel for petitioner.

WHEREFORE, Capital Airlines, Inc., respectfully moves this Court for leave to file the attached brief as *amicus curiae*.

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Washington 6, D. C.,
Of Counsel.

February 4, 1949.

Consented to on the condition stated:

PHILIP B. PERLMAN,
Solicitor General.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC., *Petitioner*,

against

CIVIL AERONAUTICS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF AS AMICUS CURIAE.

Capital Airlines, Inc. has filed this brief as *amicus curiae* because it has a vital interest in this case. Like the Petitioner, Capital lost millions of dollars due to an inadequate mail rate. Like the Petitioner here, it petitioned the Civil Aeronautics Board for an increase in its mail rate for a period prior to the date of filing the petition. As in the Petitioner's case, the Board ruled, among other things, that it had no power to adjust the rate for a period prior to the initiation of a mail rate proceeding and dismissed Capital's petition without consideration of the merits.

This action of the Board was affirmed on petition for review by the Court of Appeals for the District of Columbia Circuit on December 6, 1948 (opinion not yet reported), and Capital Airlines is preparing a petition for writ of certiorari to be filed in this Court.

The petition of Capital Airlines for a writ of certiorari will be based, in part, upon grounds not available to the Petitioner in this case. Nevertheless, a decision here in favor of the Petitioner would require the granting of the petition to be filed by Capital Airlines and a reversal of the Court of Appeals in Capital's case.

We endorse all of the arguments made by the Petitioner, but this brief is addressed to a single point which, we submit, is conclusive.

The Impact of the Fifth Amendment to the Constitution Requires that the Civil Aeronautics Act Be Construed to Confer Upon the Board Power to Increase a Mail Rate for a Period Prior to the Initiation of a Mail Rate Proceeding.

This is a different point from that presented by Petitioner's Question No. 2, and by Specification of Errors No. 9 in Petitioner's supporting brief. We do not mean that the existence of the power to adjust mail rates retroactively is necessary to the Constitutional validity of the Civil Aeronautics Act.[1] Our point here bears solely upon

---

[1] Although the services rendered by the air carriers are compulsory, so that reasonable compensation therefore is a constitutional right, the validity of the Act may possibly be sustained even though it fails to provide adequate administrative machinery for obtaining such compensation, so long as a remedy remains in the Court of Claims. United States v. Griffin, 303 U. S. 226, 238; Jacobs v. United States, 290 U. S. 13, 16; Yearsley v. W. A. Ross Construction Co., 309 U. S. 18, 21. "The provision for recovery of compensation against the United States through suit in the Court of Claims is sufficient compliance with the Constitutional provision for just compensation". Timken-Detroit Axle Co. v. Alma Motor Co., (CCA 3) 144 F. (2d) 714.

the statutory construction which should be placed upon the Act in determining whether Congress delegated complete power to the Board. This point rests upon the controlling influence to be given the Fifth Amendment in construing any statute designed to provide a system of just compensation for compelled services. This point was overlooked by the Court of Appeals and was not considered in its opinion in the case below.

Our position is identical with that adopted by this Court in the case of *United States* v. *New York Central Railway Company*, 279 U. S. 73. Notwithstanding expressions in the Railway Mail Pay Act of 1916 which indicated that Congress contemplated the fixing of rates to be effective only for the future (i.e., from and after the entry of an order), this Court held that the impact of the Fifth Amendment required an interpretation of the statute which would give the Commission power to raise the rate retroactively. The *New York Central* case, if properly understood and applied by the Court below, should have been conclusive of its decision in this case.

The Court below said:

> "The language of the disputed clause [of the Act] is not necessarily retroactive. It is as apt in reference to the future as it is to the past."

This is simply another way of saying that the language is just as apt in reference to the past as to the future, and therefore affords no obstacle to the invocation of the rule of interpretation of the *New York Central* case. Under the paramount rule of construction adopted in the *New York Central* case, there was, under such circumstances, no room for resort to standards of doubtful reliability (such as

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In this brief the Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called the "Board". The Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 977 ff., 49 U. S. C. 401 ff.) will be called the "Act". All italics are ours unless otherwise specified.

egislative history, analogy to public utility rate statutes, nd analogy to systems of payment for services not compelled but rendered under voluntary contracts).

The rule of interpretation adopted in the *New York Central* case, condensed and expressed in the Court's own words, is as follows:

> "To save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive just compensation. . . . The Government admits, as it must, that reasonable compensation for such required services *is a constitutional right* . . . this right may be enforced, in the absence of other remedies, by an action to recover compensation already due. . . . Obviously *Congress intended the Commission to settle the whole business*, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act. No reason can have existed for leaving the additional annoyance and expense of a suit for compensation during the time of the proceedings. . . . *Unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air.*" (279 U. S. at 78, 79)

The time of the pendency of the proceedings was the only past period for which the railroads sought relief in that case. The same reasoning applies to confer the *power* to fix rates for *any past period* which has not already been actually reviewed.

In the recent *Alaska Airlines Mail Rate Case* the Board itself correctly applies the rule of construction adopted in the *New York Central* case, and held that under the Act it had the power to adjust a rate for a period extending back more than four years prior to the filing of a petition for such adjustment (Opinion and Order Serial No. E-1885, August 13, 1948). In that case, a certificate of public convenience and necessity had been issued to Alaska on December 5, 1942. Section 405 (a) of the Act provides that in such event, until the Board shall fix a rate under section 406 (a), the Postmaster General shall pay at the rates pre-

viously fixed either by contract or by orders of the Interstate Commerce Commission. Alaska did not file any petition whatever for the fixing of a rate under section 406(a) until 1945, and it was not until April, 1947 that it requested the Board to reconsider and adjust the rate for the period from 1942 to 1945. The Board, relying upon the same reasoning on which we rely here, held that the Act conferred upon it the power to do so.

In its opinion in the *Alaska* case the Board said:

> "This case depends upon whether it was the intent of Congress that the rates provided in Section 405(a) were to be final until brought in issue by the institution of a proceeding, or whether it was intended that such rates be only provisional to afford carriers some compensation until the Board had an opportunity to fix final rates under the Act. • • •
>
> "The Civil Aeronautics Act is a comprehensive statute designed to regulate air commerce. Its concern is not only with the needs of the postal service but with national commerce and defense as well. *Certificates of convenience and necessity carry with them many obligations imposed by law.* Section 401(m) requires a carrier certificated for mail service to carry mail whenever required by the Postmaster General. Section 404(a) states in part that 'it shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor.' Section 401(k) forbids the abandonment of any route without previous approval by the Board, which approval may be given only upon a finding that abandonment is in the public interest. Failure to fulfill these and many other obligations are not matters to be compensated for by mere damages. Section 41(h) provides for suspension or revocation of certificates. Title IX imposes serious civil and criminal penalties. The Act, however, does not stop with imposition of obligations alone. In addition to the usual benefits that go with certificates of public convenience and necessity, the Board is directed under Section 406 to consider the '. . . need of

each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality *required* for the commerce of the United States, the Postal Service, and the national defense.'

"*In view of these extensive obligations and corresponding benefits that devolve upon a carrier upon the issuance of a certificate, it does not stand to reason that Congress intended that the rates provided in Section 405(a) should be final.* It must be remembered that these were rates fixed by contract in 1938. The Postmaster General was only interested, and properly so, in securing the best agreement for transporting mail. Any suggestion that Congress deliberately sought the continuation of any advantage contained in these contract rates must be rejected for the reason that there was no prohibition imposed with respect to the time within which rate proceedings could be instituted. We are further strengthened in our conviction that these rates were not intended to be final by the provisions of Section 401(m) which require a carrier certificated for mail service to carry mail and direct that, 'such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.' The word 'reasonable' conforms to the rate-making language and standards of Section 406 rather than to the contract price language of Section 405(a). . . ."

(Opinion of the Board, Order Serial No. E-1885, August 13, 1948, at pp. 3-5)

There is not a word in section 405(a) which confers any more power on the Board to adjust retroactively rates previously fixed thereby than in the case of rates previously fixed under section 406(a). The attempted distinction by the Board between the *Alaska* case and the Petitioner's case is wholly devoid of substance. The same principles

which supported the retroactive power in that case demand that its existence be found in this case.

We submit that the rule of the *New York Central* case *would* have been persuasive upon the Court below except for the presence in the opinion (by Mr. Justice Holmes) of the following dictum:

> "We *assume* that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint." (279 U. S. 78)

This assumption was no doubt based upon the apparent acquiescence of the railroads in its correctness. The original applications of the railroads included requests for adjustments for periods of a few months prior to the filing of the applications. They did not see fit to include in their petitions in the Court of Claims a claim for additional compensation for any period prior to the filing of the applications. In fact, it appears from 95 I. C. C. 304 that the railroads expressly waived their claims to any adjustments for periods prior to the filing date in the proceedings before the Commission. The question of the power of the Commission to make such adjustments was therefore not before either the Court of Claims or this Court and was not passed upon. The case cited in support of the dictum, *American Smelting & Ref. Co.* v. *United States*, 259 U. S. 75, dealt with *contract* prices, not with requisitioned or compelled services. The assumption, therefore (which, like all assumptions, is subject to rebuttal as in this case) was pure dictum. Yet the Court below, apparently regarding this dictum as an authoritative limitation upon the power to adjust mail rates retroactively, gave no consideration whatever to the rule of interpretation upon which the actual decision of the *New York Central* case was based. Conceivably this dictum *might* have been regarded as persuasive against the retroactive exercise of the retroactive power in the *Alaska* case, since Alaska's then existing rates had been originally fixed by *contract*, but it has no application here.

Even if it were conceded that the dictum of Mr. Justice Holmes had any value when applied to the Railway Mail Pay Act of 1916, there are significant differences between the language and provisions of that Act and those of the Civil Aeronautics Act which make wholly untenable the proposition that the power of the Board, under the latter Act, to adjust rates retroactively, is limited to periods subsequent to the initiation of a rate proceeding.

Under the Railway Mail Pay Act, the initial proceeding for fixing a rate could be inaugurated only by the Postmaster General. (Section 5, subd. 30 (a), (b) and (c); 39 Stat. 429, 430; 39 U. S. C. 545, 546, 547). Subsequent to the fixing of the original rate, proceedings could be instituted to change it only upon an *application* either by the Postmaster General or by a carrier, and then only after six months. Subd. 30 (h). The Commission was directed to fix fair and reasonable rates *only* according to this procedure. The Commission was not, as is the Board by Section 406 (a) of the Civil Aeronautics Act, "* * * directed, *upon its own initiative*"[1] to fix the rate from time to time and "to make such rates effective *from such date as it shall determine to be proper*". Thus, while a mail rate once fixed under the Railway Mail Pay Act might reasonably be regarded as having the attribute of finality for six months and until the filing of a new application, a mail rate fixed under the Civil Aeronautics Act is provisional only, since the Board retains a continuing jurisdiction from day to day to alter the rate on its own initiative, without any application, and is under a continuing duty to exercise this initiative to the end that the rate of compensation be at all times fair and reasonable.

In the former case the rate may be, for a period, beyond the power of the Commission to alter. In the latter, the rate never escapes the jurisdiction of the Board, exercisable on its own motion. This unmistakably confers upon

[1] As well as upon the initiative of a carrier, etc.

the Board the power to readjust mail rates for any prior period in the performance of *the duty delegated to it by Congress* to fulfill the obligations of the Fifth Amendment. This distinguishing feature of the Civil Aeronautics Act was pointed out by the Board in its opinion in the *Alaska* case when it said that any suggestion that Congress intended the rates fixed by Section 405(a) to be continued until brought in issue by the institution of a proceeding, "must be rejected for the reason that *there was no prohibition imposed with respect to the time within which rate proceedings could be instituted.*" (*Supra*, at p. 5)

Differing from the case of the Railroads where the compulsory carriage of the mail was superimposed upon a long-established and relatively stable industry, the Airlines were placed under federal compulsion as to their entire operations in the developmental stage of the industry. On the passage of the Act they were required by Section 401 (a) to secure a certificate from the Board or to suspend operations altogether. Under Section 401 (h) the Board on its own initiative may alter or modify such certificates.

From all of their compelled operations the Airlines derive certain non-mail revenues. These revenues are subject to violent and frequent fluctuations. Yet it is the statutory duty of the Airlines to *develop* the industry, and this involves the extension of service and the introduction of new equipment despite the fact that traffic and expense factors are untested by experience. Mail pay is the method of compensation for all of these compelled services, not for transportation of the mail alone. The compensation, by Section 406 (b), is to be fixed at an amount sufficient "with all other revenues" to enable the carriers "to maintain and *continue the development* of air transportation to the extent and of the character and quality *required* for the commerce of the United States, the Postal Service, and the national defense." The reasoning of the Board in the *Alaska* case is convincing when it says:

> "In view of these extensive obligations and corresponding benefits that devolve upon a carrier upon the issuance of a certificate, *it does not stand to reason* that Congress inteaded that the rates provided in Section 405 (a) should be final." (*Supra*, at p. 4)

With so many variables certain to operate in the future, in the face of the utter impossibility of estimating in advance with any degree of accuracy the revenues and expenses, upon which the amount of the mail pay is made to depend, no statute can embody "a system of just compensation" unless it provides for a determination of that compensation based upon the actual facts of a past period which were unknowable when the rate was originally fixed. The philosophy of the Civil Aeronautics Act approaches that of the Federal Control Act of March 21, 1918 (40 Stat. 451) more closely than that of the Railway Mail Pay Act. Under the Federal Control Act, while there was provision for current payment, based on a "standard return", it was recognized that just compensation could not be finally determined until the facts had occurred upon which it was to be based. In *Commissioner* v. *Old Dominion S. S. Co.*, (CCA 2d) 47 F. (2d) 148, the Court said:

> "Here there was an admission of liability by the Government. . . . It was a conceded liability; the *amount*, however, was not determined until a later year. The Government did not concede liability to pay merely the standard rate of return, but just compensation. Just compensation for the use of the properties for the years 1918, 1919 and 1920 was being incurred each year. Nothing remained to be determined at the close of each year except the amount of just compensation *on the basis of the past facts* and the established principles."

So, under the Civil Aeronautics Act, just compensation cannot be finally determined until the facts upon which it is to be calculated have occurred and their results, in terms of revenue and expense, reflected upon the carriers' books.

A "system of just compensation" which closes its eyes to the accomplished facts, upon which alone just compensation can be determined, is a contradiction in terms. The finding of the Court below that the Civil Aeronautics Act embodies such a travesty of justice should clearly be reversed.

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